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CONNECTICUT REPORTS:

BEING REPORTS OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

VOL. XLV.

21

BY JOHN HOOKER.

HARTFORD:
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Rec. June 26, 1879

JUDGES
OF THE
SUPREME COURT OF ERRORS
DURING THE TIME OF THE WITHIN DECISIONS.

HON. JOHN DUANE PARK, CHIEF JUSTICE.

HON. ELISHA CARPENTER.

HON. DWIGHT WHITEFIELD PARDEE.

HON. DWIGHT LOOMIS.

HON. MILES TOBEY GRANGER.

**The Statute Book referred to in this volume as the Revised
Statutes or General Statutes, is the revision of 1875.**

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ERRATA.

P. 10, seventh line from bottom—for *them* read *their successors*. This correction is made from the original will, the printed copy used in the case containing the error.

Vol. 44, p. 225, third line—for *sec. 4* read *sec. 3*.

" 44, p. 328, seventeenth line—for *deeding* read *desiring*.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ERRORS
OF THE
STATE OF CONNECTICUT.

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COUNTIES OF HARTFORD, MIDDLESEX, AND TOL-
LAND.

MAY TERM, 1877.
[Continued from the last volume.]

Present,
PARK, C. J., CARPENTER, PARDEE, LOOMIS, AND GRANGER, JS.

WILLIAM DRAKE AND OTHERS' APPEAL FROM PROBATE.

Where a testator, leaving an estate of \$14,000, with no family, made a will five days before his death and while suffering from severe disease, by which, after giving two of his brothers \$1,000 each, \$1,000 to certain other relatives and \$1,000 to a friend, he gave the residue of his estate to a church in the town where he lived; and it appeared that the will was drawn by *H*, who was a vestryman of the church and who was the only person who conversed with him on the subject, and who was also made sole executor; that three brothers and a sister of the testator lived within a few miles of him and were not notified of his being dangerously ill until shortly before his death and after the will was executed; that *H* was deeply interested in the welfare of the church and a liberal contributor to its support; that he and another vestryman were two of the witnesses to the will and a brother-in-law of *H* the third witness; and that the will described certain half nephews and a half niece of

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Drake's Appeal from Probate.

the testator as his brothers and sister;—it was held that the circumstances were such as to create a suspicion of undue influence, which might be considered by the jury without any direct proof of such influence, and to require explanation on the part of the persons propounding the will.

Whether the two vestrymen were competent witnesses to the will: *Quere*.

APPEAL from a decree of a probate court approving the will of Henry Drake, deceased; taken to the Superior Court in Hartford County, and tried to the jury, upon the issue of unsoundness of mind of the testator and undue influence and fraud practiced upon him, before *Culver, J.* The will was as follows:

“I, Henry Drake, of Windsor, county of Hartford, Connecticut, of sound and disposing mind and memory, and mindful of the uncertainty of human life, do make, publish and declare the following as and for my last will and testament.

“*First.* I give and bequeath to my brothers, William Drake and Timothy Drake, to each of them, the sum of one thousand dollars to be paid by my executor from my estate.

“*Second.* I give and bequeath to my young friend, Miss Jenny D. Lavery, also the sum of one thousand dollars, to be paid as above from my estate.

“*Third.* To my brothers Nathan Drake and Samuel Drake, also to my sister, Mrs. Olive Mills, Mrs. Eliza Wells, and Mrs. Ellen Kellogg, to each one of them the sum of two hundred dollars.

“*Fourth.* To my friend Mr. Lomax, for his accommodation and comfort, I give so much land from my lot as is required to make uniform the line of Mr. Marble's land, the same to be continued to the street line. And I direct my executor to make suitable conveyance by deed to perfect said title.

“*Fifth.* All the rest, residue and remainder of my property, real and personal, I give and bequeath to the vestry and wardens of Grace Church, Windsor, and to them in office, to be held by them as trustees, the income and rents only to be used by them for the support of the ministry of said church in its mission and worship. And I require said wardens and vestry to exercise great care in its investment, seeking security rather than large income for the same. Said fund to be known as the Henry Drake fund for all time.

Drake's Appeal from Probate.

"I hereby constitute and appoint my friend H. Sidney Hayden, of Windsor, executor of this my last will and testament.

"Witness my hand and seal this 10th day of November, 1874, at Windsor. HENRY DRAKE. [L. S.]"

The will was witnessed by Charles N. Barber, Osbert B. Loomis, and H. S. Hayden.

It appeared upon the trial that two of the subscribing witnesses to the will, H. Sidney Hayden, and Charles N. Barber, were at the time of the execution of the same and still were, vestrymen of said Grace Church of Windsor, and members of the wardens and vestry of said Grace Church; also that Osbert B. Loomis, the remaining witness, was the brother-in-law of Hayden. Whereupon the appellants requested the court to charge the jury that said Hayden and Barber were interested in the matter of the will, and not legally competent to subscribe as witnesses or attest the same; but the court did not so charge the jury, and gave the jury no instruction on that subject.

The appellants also requested the court, if it should be of opinion that said Hayden and Barber were legally qualified to witness the will, to charge the jury that as they were vestrymen of said Grace Church, as a legatee under the will, the situation and conduct of the witnesses to the will required explanation; that their testimony was subject to suspicion, and that the appellees were bound to show by the preponderance of evidence that every thing connected with the instrument was free from impropriety and any unfairness. But the court did not so charge the jury.

It also appeared upon the trial that Hayden, at the request of the testator, drafted the will, and was the only person who claimed to have conversed with the testator, or to have had any interview with him about the same; that the will was drawn by Hayden and signed by the testator about five days before his death, and while he was suffering from severe disease, in the absence of all his relatives, although he had three brothers and one sister, living in the city of Hartford next adjoining Windsor; and that none of said relatives had any

notice that the deceased was dangerously sick until after the making of the will. Also that said Charles N. Barber, who was an attendant on the day of the making of the will, and before the same was executed, did not send any word to the relatives, saying they would not come if they were sent for, although he had no reason to know that they would not come, except that he understood there was not a very kind feeling existing between them and the deceased.

It was further proved that Hayden was an active member of said Grace Church, and deeply interested in its prosperity, and was in the habit of contributing liberally to its support; and that the testator died possessed of an estate valued at about fourteen thousand dollars.

Upon the foregoing facts, the appellants requested the court to charge the jury that the law raised a sufficient presumption of undue influence to change the burden of proof, and cast upon the appellees the duty of showing that every thing connected with the instrument was free from unfairness and impropriety.

The appellants also requested the court to charge the jury that, as fraud and undue influence are not ordinarily susceptible of direct proof, such undue influence might be inferred from the nature of the transaction alone, and that the jury had a right to infer undue influence from the foregoing facts.

Upon all the claims of the appellants as to undue influence and unfairness, the court instructed the jury that the burden of proof was on the appellants, that if they should find that from any cause or by any means the testator was induced to act contrary to his wishes, and to make a different will and disposition of his estate from what he would have done if left entirely to his own discretion and judgment; that his free agency and independence were overcome; that by some dominion or control exercised over his mind, he was constrained to do what was against his will, and what he was unable to refuse and too weak to resist, then they should find the issue in favor of the appellants. But moderate and reasonable persuasion, though yielded to, if done intelligently and from a conviction of duty, would not vitiate his will, if otherwise valid.

Drake's Appeal from Probate.

It was also proved that the persons described in the third clause of the will as "brothers" and "sister," were in fact the half nephews and half niece of the testator, and it appeared by the testimony of Hayden, that after the death of the testator and before the 30th day of November, 1874, the date of the probate of the instrument, he altered the will by changing the word "brothers" to "nephews," and the word "sister" to "niece," and in that condition it was admitted to probate as above stated, and so recorded; and that at some time afterwards, and before the trial in the Superior Court, Hayden altered back the will and the record thereof, so as to make the clause read "brothers and sister."

The appellants thereupon claimed that the instrument produced by the appellees was not the same instrument admitted to probate, from which the appeal was taken. Upon this claim the court instructed the jury that they must be satisfied that the instrument admitted to probate, was the one from which the appeal was taken; that the alteration proved did not destroy its identity, nor render it void; and that an alteration of a will by a third person, even if fraudulently made, would not invalidate it.

The jury having returned a verdict for the appellees, the appellants moved for a new trial for error in the charge of the court and in the refusal of the court to charge as requested.

A. P. Hyde and L. E. Stanton, in support of the motion.

1. The witnesses Hayden and Barber were disqualified by interest from attesting the will. At common law, any interest of the witness, however small, invalidated the whole devise. *Starr v. Starr*, 2 Root, 303; *Clark v. Hoskins*, 6 Conn., 109.

2. Upon the facts of the case the charge of the judge was clearly wrong. The circumstances attending the execution of the will, the peculiar relation which Hayden occupied with reference to the testator, together with the acknowledged fact of the alteration of the will by Hayden, all required a charge better adapted to the facts of the case. The court

 Drake's Appeal from Probate.

however refused the instructions approved by this court in *St. Leger's Appeal from Probate*, (34 Conn., 434,) and simply told the jury that the burden of proving undue influence was upon the appellants. The jury must have understood that the appellants were bound to establish undue influence and fraud by positive testimony. These instructions, contrary to our own adjudged cases, undoubtedly determined the verdict.

3. On the question of soundness of mind, it will not be denied that the burden was upon the appellees. *Knox's Appeal from Probate*, 26 Conn., 20. Upon the question of unfairness and undue influence, the court in *St. Leger's Appeal* told the jury that a similar set of facts changed the burden of proof, and cast upon the appellees the duty of proving the fairness and propriety of the transaction. See also *Tyler v. Gardiner*, 35 N. York, 594; *Delafield v. Parish*, 25 id., 35; *Marsh v. Tyrrell*, 2 Hag., 87; *In re Welsh*, 1 Redf. Sur. R., 244; *In re Langton's will*, 1 Tuck. Sur. R., 301; *Barry v. Butlin*, 1 Curteis Eccl. R., 637; *Beall v. Mann*, 5 Geo., 456; *Simpler v. Lord*, 28 id., 52; *Leacraft v. Simmons*, 3 Bradford, 35; *Marvin v. Marvin*, 4 Keyes, 9; *Lee v. Dill*, 11 Abbott Pr. R., 218; 1 Redf. on Wills, 121, 158.

4. The alterations were not by a stranger. If they were material, being made by a party, they would avoid the instrument, or at least the bequest in which the party was interested as legatee. *Pigot's case*, 11 Coke, 29; *Jackson v. Malin*, 15 Johns., 297; *Smith v. Fenner*, 1 Gall., 170. The alterations were made before probate. The will presented in the Superior Court was not identical with that from which we took the appeal. The jury should have been informed that the presumption is against a party who thus behaves with a will.

G. G. Sill, contra.

1. The witnesses Hayden and Barber were competent. *Cornwell v. Isham*, 1 Day, 35; *Clark v. Hoskins*, 6 Conn., 106; Gen. Statutes, tit. 18, ch. 11, sec. 3.

2. The relations which operate to change the general rule that the burden of proof is on those alleging undue influence,

Drake's Appeal from Probate.

did not exist in this case; Mr. Hayden was neither the attorney nor the confidential adviser of the deceased. The motion does not show any confidential relation and this court will not infer any. *St. Leger's Appeal from Probate*, 34 Conn., 434; *Baldwin v. Parker*, 99 Mass., 79; *Barry v. Butlin*, 1 Curteis Eccl. R., 638.

3. As to the alteration in the will, there is no question of law. The parties went to trial on the issue whether the will was duly signed by the testator and whether he had the capacity to make a will; the jury having determined both these questions in favor of the appellee, the appellants can not raise the question here. Besides this, even admitting that the rule in *Pigot's case* has any application to the facts of this case, the alteration was an immaterial one and did not affect the will. *Malin v. Malin*, 1 Wend., 625; *Jackson v. Malin*, 15 Johns., 297; *Wood v. Wood*, 1 Phillemore, 857.

CARPENTER, J. The will of Henry Drake is contested mainly on the ground that it was obtained by undue influence. The jury sustained the will, and the appellants ask for a new trial for a misdirection. The material facts are these:—The testator left no family, his next of kin being brothers and sisters, who lived but a few miles from him. They were not informed of his dangerous sickness and knew nothing of his intention or desire to make a will until after it was made. It was made five days before his death and while he was “suffering from severe disease.”

H. S. Hayden, Esq., at the request of the testator, wrote the will, and he “was the only person who claimed to have conversed with the testator, or to have had any interview with him about the same.” What occurred at these interviews, and what conversation passed between them on the subject of the will does not appear.

The testator's estate amounted to about fourteen thousand dollars, of which about ten thousand dollars was given to the wardens and vestry of Grace Church.

Said Hayden was at the time a vestryman of Grace Church, and was made sole executor of the will. He was also “an

active member of said Grace Church, and deeply interested in its prosperity, and was in the habit of contributing liberally to its support." He and another vestryman of said church were two of the witnesses to the will.

It was also proved that the persons described in the third clause of said will as brothers and sister were in fact the half nephews and half niece of the testator. After the death of the testator, and before the will was admitted to probate, Hayden altered it by erasing the words "brothers" and "sister" and inserting in lieu thereof respectively the words "nephews" and "niece," and in that condition it was admitted to probate and recorded. Afterwards, and before the trial in the Superior Court, he again changed it, so that it now reads as it was originally written, and also changed the record thereof.

A question was made in the court below whether the two vestrymen of Grace Church were competent witnesses. That question and the kindred one whether the statute making legacies to subscribing witnesses void, removes the disqualification, we pass by, and will consider only the question of undue influence.

The appellants made three several requests, that the court should charge the jury on the subject of undue influence, as follows:

That as the witnesses "were vestrymen of said Grace Church, as legatee under said will, the situation and conduct of the witnesses to said will required explanation; that their testimony was subject to suspicion, and that the appellees were bound to show by the preponderance of evidence that every thing connected with the instrument was free from impropriety and any unfairness."

Also, that the law upon the facts "raised a sufficient presumption of undue influence to change the burden of proof, and cast upon the appellees the duty of showing that every thing connected with the instrument was free from unfairness and impropriety."

Also, "that as fraud and undue influence are not ordinarily susceptible of direct proof, such undue influence may be inferred from the nature of the transaction alone, and that

the jury had a right to infer undue influence from the facts aforesaid ”

The court did not comply with any of these requests, but, as the record states, “upon all the claims of the appellants as to undue influence and unfairness, the court instructed the jury that the burden of proof was on the appellants; that if they should find that from any cause or by any means the testator was induced to act contrary to his wishes, and to make a different will and disposition of his estate from what he would have done if left entirely to his own discretion and judgment, that his free agency and independence were overcome, that by some dominion or control exercised over his mind he was constrained to do what was against his will, and what he was unable to refuse and too weak to resist, then they should find in favor of the appellants.”

We will not undertake to say that it was the duty of the court to charge the jury precisely as requested and in the language of counsel; nor will we say that the substance of every part of the requests should have been given to the jury. Some things contained in them, especially in the first two, may be objectionable, or at least may be understood in an objectionable sense.

From the charge as given we think that the jury must have received the impression that it was the duty of the appellants to prove affirmatively, and by direct proof, that the “testator was induced to act contrary to his wishes, and to make a different will and disposition of his estate from what he would have done if left entirely to his own discretion and judgment; that his free agency and independence were overcome;” and that “he was constrained to do what was against his will, and what he was unable to refuse and too weak to resist.”

From the omission to charge that undue influence might be inferred from the nature of the transaction alone the jury probably supposed that they had no right to infer undue influence from the facts and circumstances proved and admitted.

The substance of the request as applicable to this part of the case is, that direct proof is not essential, but undue influ-

ence may be inferred from circumstances, and that the jury had a right to infer it from the circumstances of this case.

The first part of this last request is unexceptionable if we regard its meaning as just stated. The language employed by counsel—"may be inferred from the nature of the transaction alone," if interpreted strictly may not be technically accurate, for the "nature of the transaction" is distinguishable from the circumstances attending it. But that construction is too narrow. The language was evidently used in a broader sense and included in its meaning the attending circumstances. In that sense it was manifestly used in *Tyler v. Gardiner*, 35 N. York, 594, from which case the expression was borrowed. It is apparent also from the last clause, which is to be considered in this connection, in which it is claimed that undue influence may be inferred "from the facts aforesaid," and not from the abstract nature of the transaction. As thus understood it was a proper request, and should have been complied with, provided the circumstances are such as to render such a charge proper. Whenever there is evidence tending to prove every material point involved in the issue we suppose it is the right of either party to have the jury pass upon it. If therefore the circumstances of this case were of such a character as to afford some evidence that there was undue influence the appellants had a clear and unquestionable right to have the jury say whether it was sufficient. It only remains for us to inquire whether such circumstances existed.

A will written by a party benefited by it was void by the civil law. At common law such a will is not void, but proof may be received to show that the paper is in fact the will of the decedent. The amount of proof required varies with the circumstances. If the interest is small in proportion to the whole estate, and the decedent at the time of making the will was in health, and in the possession of his faculties, slight proof will suffice. On the other hand, if his mind is feeble and the party drawing the will takes a considerable portion of the estate to the exclusion of heirs, proof of the most conclusive nature will be required.

The following extracts from eminent English jurists will illustrate and sustain this position.

"The presumption also is strong against an act done by the agency of a party benefited; the act is not actually defeated, as it was by the civil law, provided the intention can be fairly deduced from other circumstances. Though the court will not presume fraud it will require strong proofs of intention." Sir John Nicholl in *Billinghurst v. Vickers*, 1 Phillimore, 187.

"The court is always extremely jealous of a circumstance of this nature. By the Roman law *Qui se scripsit heredem* could take no benefit under a will. By the law of England this is not the case; but the law of England requires in all instances of the sort that the proof should be clear and decisive; the balance must not be left *in equilibrio*; the proof must go not only to the act of signing, but to the knowledge of the contents of the paper. In ordinary cases this is not necessary; but when the person who prepares the instrument, and conducts the execution of it, is himself an interested person, his conduct must be watched as that of an interested person; propriety and delicacy would infer that he should not conduct the transaction." *Parke v. Ollat*, 2 Phillimore, 323. The same doctrine is found in *Ingram v. Wyatt*, 1 Hagg., 384.

A few years later Sir Herbert Jenner, in *Barry v. Butlin*, 1 Curteis, 614, said, "that where a paper has been drawn up by a person for his own benefit, or where he takes a considerable benefit under it, the presumption lies strongly against the act, and it requires to be proved by satisfactory evidence dehors the instrument, that it was the free and voluntary act of a capable testator and executed with a full knowledge of its contents and effect. This presumption is still stronger where an only son is excluded, and requires to be removed by clear evidence of rational motives in the deceased to make such a disposition."

From this decision an appeal was taken to the Privy Council and the sentence of the prerogative court was affirmed. Mr. Baron Parke stated the rule as follows: "That if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court and calls upon it to be vigilant and jealous

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in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased." 1 Curteis, 637.

The same rule has been adopted in the state of Georgia. *Beall v. Mann*, 5 Geo., 456; *Hughes v. Meredith*, 24 Geo., 325; *Simpler v. Lord*, 28 Geo., 52. Also in New York. *Lee v. Dill*, 11 Abbott's Practice R., 218; *Leacroft v. Simmons*, 3 Bradf., 85; *In re Welch*, 5 Bradf., 244; *Langton's Will*, 1 Tucker's Sur. Reports, 301; *Tyler v. Gardiner*, 35 N. York, 594; *Delafeld v. Parish*, 25 N. York, 35.

Had Mr. Hayden himself been the legatee instead of the church this principle would clearly apply. Perhaps no decision can be found which carries the doctrine so far as to apply it to a case like this. There are those however which are nearly analogous. In *Tomkins v. Tomkins*, 1 Bail., 96, a mere interest as guardian was considered sufficient to require the application of the rule. "The rector of a church which is a residuary legatee in a will, who has the nomination to two scholarships created by it in a theological seminary, who procured the will to be drawn, was named therein as sole executor thereof, and superintended its execution, is a person so benefited by it as to require an investigation as to its spontaneous character. The degree of that interest is immaterial except perhaps as to the weight of evidence required to prove volition." *In re Welch*, 5 Bradf., 238. In *Langton's Case*, supra, the testator was a man of weak mind. A church was the chief legatee. The only persons cognizant of the drawing of the will were the clergymen and their counsel, and the will was prepared without openness or publicity. The principle was applied.

But we do not intend to hold that the interest of Mr. Hayden is such an interest as is contemplated by the authorities cited above. We leave that an open question. Nevertheless that he was benefited in a certain sense, and was to a considerable extent interested in behalf of this will, is obvious. That such benefit and interest were circumstances to be con-

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sidered and weighed by the jury ought not to be doubted. More than two-thirds of the whole estate, amounting to about ten thousand dollars, was given to the church. Mr. Hayden was a vestryman, and as such had a voice in the management of the fund thereby created. As a member of the church he was "deeply interested in its prosperity, and was in the habit of contributing liberally to its support." The income of the proposed fund would take the place in part of his own contributions. As a member of the church he was less liable to taxation, and the necessity for his voluntary contributions was materially diminished. To this pecuniary interest may be added his interest in, and natural desire for, the material welfare of the church with which he was connected.

The fact that he took an unusual interest in the establishment of this will is apparent from the circumstance that when he discovered that some of the testator's relatives were incorrectly described he changed the will in that respect, and after it had been proved and recorded as altered, he changed it back and changed the record to correspond.

The deceased was an unmarried man. His brothers and sister were the natural objects of his bounty. They lived but a few miles from him, but were not notified of his sickness, and were not present at the making of the will, and received by it but a small portion of his estate.

The will was executed when he was near his end, and while he was "suffering from severe disease." That his mind may have been seriously affected, so that he was not able to comprehend the scope and effect of the instrument he signed, is obvious from the circumstance that his half nephews and half niece were described therein as brothers and sister. If he was unable to comprehend the relationship existing between himself and these legatees, or, if comprehending it, he paid so little attention to the terms of the will as not to notice such a glaring misdescription, it affords, unexplained, strong evidence that his mind was very much enfeebled and in a condition to be easily influenced.

All these circumstances are susceptible of explanation if the facts will warrant it, so as to break or destroy their force

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as evidence against the validity of the will. Mr. Hayden, the only person who knows all about the origin of this will, could have stated all the circumstances to the jury. The reason, if any existed, why the relatives were not notified, and why they were practically disinherited, could have been shown. If the testator, by reason of being a communicant of Grace Church, or for other cause, had manifested an interest in its welfare, and his course of life had been such as to lead to a reasonable expectation that it would receive a large portion of his estate, that could have been shown.

The motion fails to disclose any explanation of these circumstances. If none was in fact given, that of itself adds materially to their weight. If under these circumstances the jury had pronounced against the will, the evidence would have sustained the verdict. We think therefore that the appellants were entitled to the instruction asked for, that undue influence might be proved by circumstantial evidence. That not having been given they are entitled to a new trial.

In this opinion PARK, C. J., and GRANGER, J., concurred; PARDEE and HOVEY, Js., dissented.

[NOTE.—Judge HOVEY sat in this case in the place of Judge LOOMIS who was absent.]

45	22
62	154
45	22
63	218
45	22
66	240



FIRST NATIONAL BANK OF HARTFORD vs. THE HARTFORD LIFE AND ANNUITY INSURANCE COMPANY AND OTHERS.

The act (Gen. Statutes, tit. 17, ch. 1, sec. 9.) provides that shares of stock may be pledged by delivering a power of attorney for their transfer, with the certificate of the stock, to the pledgee; but that no such pledge, without an actual transfer of the stock, shall be effectual against any person but the pledger and his executors and administrators, until a copy of the power of attorney shall have been filed with the treasurer or secretary of such corporation. Another act, passed in 1875, (Gen. Statutes, tit. 17, ch. 1, sec. 8,) provides that corporations "shall at all times have a lien upon all the stock owned by any person therein, for all debts due to them from such person." Held—that the latter act, immediately on its going into effect, created a lien

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in favor of a corporation for an old indebtedness, upon stock which had previously been pledged to a third person, such pledge being merely by delivery of the certificate of the stock and a power of attorney for its transfer, with no copy of the power of attorney filed with, or other notice to, the corporation.

A further pledge of the stock was made in the same manner after the act of 1875 was passed, the certificate then delivered being one issued by the company after the passage of that act, and containing no notice of any right of lien on the part of the corporation. Held that the corporation was still entitled to its lien upon the stock as against the pledgee.

Commissioners on an insolvent estate are a special statutory tribunal, created for the sole purpose of determining what claims are entitled to payment from the estate; and their action does not constitute a judgment that can be used for any other purpose.

G had pledged to the plaintiffs, as security for a loan of money, certain stock of the defendants, a corporation of which he was a member, by a mere delivery of the certificate of the stock and a power of attorney for its transfer. He was also indebted to the defendants. G died insolvent. Both creditors presented their claims to the commissioners on his estate, and they, considering the plaintiffs as having a valid pledge of the stock, deducted its value from the amount of their claim and allowed only the balance; at the same time allowing the defendants' claim with no deduction on account of the stock. Neither party appealed from the report of the commissioners. Held—

1. That there was nothing in the action of the commissioners that estopped the defendants, in a suit in which the plaintiffs claimed to be the owners of the stock, from asserting their right to a lien upon the stock under the statute.
2. That equity required that, if the defendants were allowed to keep the stock, they should pay the plaintiffs the amount by which the plaintiffs' dividend had been reduced and their own to the same extent increased, by the action of the commissioners in deducting the value of the stock from the plaintiffs' claim and not from their own.

A waiver is an intentional relinquishment of a known right. The existence of such an intent is a matter of fact, that should be found by the court below and not left to be inferred by this court.

AMICABLE SUBMISSION to the Superior Court in Hartford County upon the following agreed statement of facts; the parties to the submission being the First National Bank of Hartford, the Hartford Life & Annuity Insurance Company, and Niles P. Hough and Henry A. Whitman, executors of Wareham Griswold, late of Hartford, deceased.

Wareham Griswold, at the time of his death, on the 13th day of January, 1876, was the owner of one thousand and forty-one shares of the capital stock of the Hartford Life & Annuity Insurance Company, which shares were of the par value of \$100 each, and which shares stood in his name on the books of the company at the time of his death. Down to

the time of his death he was supposed to be a man of large means.

In the year 1872, Griswold was indebted to the First National Bank of Hartford in about the sum of \$40,000 for loans theretofore made by the bank to him. As collateral security for these notes Griswold at that time delivered to the bank a certificate for one hundred shares of the capital stock of the Hartford Life & Annuity Insurance Company, the certificate being numbered 374, with a power of attorney to the bank to transfer the shares to the bank; also a certificate for one hundred and fifty shares of the same stock, numbered 423, with a like power of attorney; and also delivered to the bank as collateral security for the loan certain notes belonging to him, and secured by mortgage, to the amount of about \$40,000.

The paper so held by the bank remained unpaid till about the 24th of December, 1875, when the bank took new notes for the \$40,000, and surrendered to Griswold the power of attorney to transfer the certificate No. 374 for one hundred shares, and Griswold gave to the bank a new power of attorney to transfer the same shares.

About the same time the bank made Griswold a new and additional loan for \$5,500, taking his note therefor.

Afterwards, on the 10th of January, 1876, the bank, at the request of Griswold, delivered to him all the mortgage notes, amounting to about \$30,000, and also surrendered to him the power of attorney authorizing the bank to transfer to itself the second certificate, numbered 423, for one hundred and fifty shares of the stock of the insurance company, and thereupon Griswold executed and delivered to the bank a new power of attorney to transfer the same stock to the bank.

On the same day, the 10th of January, 1876, Griswold delivered to the bank another certificate of stock in the Hartford Life & Annuity Insurance Company for two hundred and ninety-six shares, as collateral security for the notes, with a power of attorney to transfer the same.

The bank did not actually transfer any of this stock to itself during the life-time of Griswold, nor did it give any

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notice to the Hartford Life & Annuity Insurance Company, that the bank claimed any lien on the stock, excepting so far as the knowledge of Griswold, who was president of the insurance company, constituted such notice, or furnish to the insurance company any copy of either of the powers of attorney, and the insurance company had no knowledge of the same during the life-time of Griswold, excepting so far as the company was chargeable with the knowledge of Griswold.

On the 31st of December, 1875, the Hartford Life & Annuity Insurance Company made a temporary loan to Griswold for the sum of \$1,981.90, taking his memorandum check therefor.

On the 12th of January, 1876, it was agreed between the insurance company and Griswold that the company would loan him \$10,000, receiving as collateral twenty-two shares of Providence Screw Company stock. Griswold informed the company that his certificates were in Providence, Rhode Island, that he had ordered them to be forwarded at once to Hartford, and that he would transfer them on their arrival, and as an accommodation, in the meantime, desired the company to advance him \$8,500 till the arrival of the certificates, when these temporary loans would be taken up. The company, at his request, did on that day advance the \$8,500, and received therefor his memorandum check for \$5,000, and also two overdue notes signed by E. G. Hastings and guaranteed by Griswold, amounting to \$3,500. These temporary advances were made by the company under the belief that Griswold was possessed of a large estate, and was abundantly responsible; and this belief was induced, in part, by the fact that he appeared to be the owner of so large an amount of the stock of the company unincumbered.

Griswold died suddenly on the night of the 13th of January, 1876, and his estate is badly insolvent. He left a will, of which there are two executors, Niles P. Hough and Henry A. Whitman, who are parties to the present suit.

The certificates of the Providence Screw Company stock did not arrive in Hartford till after Griswold's death. After they were received by his executors, which was a few days

after Griswold's death, Whitman, one of the executors, requested the bank to release one hundred and forty-nine shares of the stock of the insurance company, claiming that the same was held by Griswold in trust for others, and offered to transfer to the bank in lieu thereof the twenty-two shares of the Providence Screw Co. stock. To this the bank assented, and delivered to Whitman a certificate for two hundred and ninety-six shares, with an accompanying power of attorney for their transfer to the bank. Whitman, as executor, then transferred one hundred and forty-nine shares on the books of the insurance company, and the insurance company issued a new certificate to the estate of Griswold for one hundred and forty-seven shares, which certificate Whitman delivered to the bank, with a power of attorney for its transfer, and also transferred to the bank the twenty-two shares of Providence Screw Co. stock.

On the 17th of January, 1876, the bank filed with the insurance company copies of all the powers of attorney, and sought to transfer all the shares in compliance therewith.

Griswold, at the time of his death, was the owner of one hundred shares of stock of the First National Bank, represented by two certificates of fifty shares each, one numbered 756, dated December 20th, 1871, and one numbered 772, dated April 5th, 1872, and on the 20th day of January, 1876, Whitman, as executor, exhibited to the bank an envelope containing these two certificates, on which was a memorandum in Griswold's handwriting, as follows: "This 100 shares of First National Bank stock is the property of Griswold, Whitman & Welch;" and informed the bank that it was his duty to transfer the same to Whitman & Welch, surviving partners, and that the judge of probate had directed him so to do. The bank allowed the transfer upon surrender of the certificates, which transfer was made by Whitman as executor.

The bank has demanded from the insurance company a right to transfer the stocks on the books of the company to the bank under the powers of attorney, which the company refused to allow. Other creditors of Griswold have protested against the company allowing such transfers to be made.

Whitman, as executor, on the 15th day of January, 1876, transferred to himself, on the books of the insurance company, two hundred shares of the stock of the insurance company, and on the 21st day of January, 1876, also transferred in like manner two hundred and sixty shares of the stock to George M. Ives, and on the 25th day of January, 1876, Whitman in like manner transferred ninety-two shares to himself and ninety-two shares to said Ives, claiming that all the stock so transferred by him was held in trust by Griswold for himself and Ives.

Griswold for a long time before his death was president, and the largest stockholder of the insurance company.

Since his death a dividend of five per cent. has been declared on the stock, but the dividend on the stock so claimed by the bank has not been paid to any one.

Griswold's estate was represented as insolvent, and commissioners were appointed upon it. Both the bank and the insurance company presented its claim in detail to the commissioners. The bank represented the stock of the insurance company, to the amount of three hundred and ninety-seven shares, as held by itself as collateral security for its claim; the insurance company made no representation as to any lien upon the stock in question for the security of its claim. The commissioners allowed, in addition to other claims of the bank not secured, a claim of \$50,627.73 as a secured claim, to which they applied the value of the 397 shares of the stock of the insurance company, which they valued at \$31,760, and which, with other collaterals of the value of \$8,699, they deducted from the amount of the claim, and allowed only the balance, \$10,168.73. The commissioners also allowed a claim in favor of the insurance company, to the amount of \$46,601.28, with no deduction on account of the lien of the company on the stock standing in Griswold's name. The report of the commissioners was duly made to and accepted by the court of probate, and no appeal was taken from it by either the bank or the insurance company.

Upon these facts the case was reserved by the Superior Court for the advice of this court.

H. C. Robinson, for the plaintiffs.

First. The delivery of the certificates and powers of attorney bind the estate. The pledge of stocks in that mode is by statute made binding upon the individual and his estate. "Shares of stock in any corporation * * * may be pledged by executing and delivering a power of attorney for its transfer, with the certificate of stock therein mentioned, to the party to whom the pledge is made; but no such pledge, unless consummated by actual transfer of the stock to the name of such party, shall be effectual to hold such stock against any person but the pledger and his executors and administrators, until a copy of said power of attorney shall be filed with the cashier, treasurer, or secretary of said corporation." Of course the executors represent creditors as well as heirs.

Second. The insurance company cannot object to the transfer. Their refusal at the time was based upon anxiety for the creditors, and their promised interest in the screw stock. They now claim a lien. To this we reply, that they have had no lien as against us upon these shares; and if they have it has been waived.

1. The insurance company has had no lien upon these shares as against us. Before the revision of 1875 only joint stock corporations had a lien upon the shares of their stockholders. Especial provision was made for enforcing these liens. The revisors by omitting a single word, "such," and placing the present section, (§ 8, p. 279,) in the general provisions applicable to corporations, have given it a new force, which now comes to the court for construction the first time, as we believe. The language of the statute is very broad, and its very breadth will induce a court to criticise it somewhat sharply. If it means that a corporation may issue clean certificates of proprietorship in its capital stock transferable upon its books on surrender of the certificate, (as were the certificates at bar,) with no intimation upon them of the intention of the corporation to claim its lien, and the corporation may assert its lien upon all debts of every kind against all the stockholder's shares, against *bonâ fide* purchasers for value and honest loans, a new danger has been added to pur-

chases of stocks which is not yet appreciated by the public. There can be no safety in purchasing stocks, or lending upon them, until the purchaser or borrower is certified of his safety by a certificate in his own name. Such a state of things is at least new. The corporation issues its certificates to whom it may concern, certifying that the shareholder's proprietorship is transferable upon surrender of the certificate by the shareholder or his attorney. The significance of the certificate itself is well urged by Judge Bosworth in favor of purchasers in *McCready v. Rumsey*, 6 Duer, 582. He says:—"When there is nothing in the terms of a certificate to indicate that the stock has not been fully paid for, and an outside purchaser of the certificate has no notice that it has not been paid for, it is difficult to see why he should be affected by a lien created by the articles of association." And the U. States Supreme Court in *Union Bank v. Laird*, 2 Wheat., 393, emphasize the fact that the corporation verifies by the oath of its officers the fact that they had no intention to waive, and did not waive, a lien by the issue of an ordinary certificate; as if the fact of issuing the clear certificate presumed a waiver which must be rebutted by oath. We submit that it is more for public interest to construe the statute to apply universally to the stockholders themselves, but to their attorneys or assigns only when the certificate itself apprises them of the corporation's intention to claim a lien. But the statute has no application to our right to transfer two hundred and fifty of these shares. These the bank has held from 1872. They were avouched by the two certificates, No. 374 and No. 423, which have been continuously in the bank's possession, and it has always had a power of attorney to transfer these shares. The powers were changed December 24th, 1875, and January 10th, 1876, but these changes were simply substitutions, and the attorneyship never for a moment ceased. The original transactions were made under the law as it existed in 1872. That law, enacted in 1871, made the pledge as good and "effectual as if the same had been transferred to said party on the books of such corporation." The statute goes on to say that the shares shall be open to attach-

ment by creditors, and shall pass to a trustee in insolvency or an assignee in bankruptcy, until a copy, etc., is filed. The pledge of these shares then was good in 1872 against the corporation by the terms of the statute, and the corporation had no lien then. The revision of 1875 did not affect our rights, for they were expressly protected by the revision itself (p. 551, sec. 2).

2. If the corporation ever had a lien, they have waived it upon these shares. When the bank presented its copies of power of attorney and sought to make transfers on the 17th of January, 1876, which was in a reasonable time after the death, the insurance company waived its lien when it failed to assert it. *Weeks v. Goode*, 6 Com. Bench, N. S., 367; *Coite v. Winter*, 3 Code Reporter, 142; *Brinley v. Adams*, 14 Wend., 201; *Murphy v. Lippe*, 35 Jones & Sp., 542. The company also waived its lien by writing a new certificate in the name of the estate for the hundred and forty-seven shares. Also by allowing the executor to transfer four hundred and forty-four shares of Griswold's stock after notice of the title of the bank. Also by failing to present it as a claim upon Griswold's estate in the commissioners' court, and by presenting a list of their securities and omitting any claim of lien upon these shares. The statute provides for just such a state of things, (p. 390, § 13,) and contemplates a presentation of the claim for lien. But if there was no legal obligation upon the insurance company to claim their lien, they still abandoned it, and will be estopped against claiming it after having presented a list of unsecured claims, and another list of secured claims with the shares of stock omitted from their list of securities. They can not take a dividend upon an unsecured balance and afterwards exhaust the whole of their undisclosed security. It would be inequitable and unjust. *Gregory v. Benedict*, 39 Conn., 22; *Bailey v. Bussing*, 41 id., 74. The company has also waived its lien by consenting to the claim of the bank before the commissioners without opposition or appeal.

Third. The finding of the commissioners and the acceptance of their report allowing our lien and acquiescing in the

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insurance company's non-presentation of any claim upon these shares, is a judgment conclusive upon all the parties before the probate court,—the estate, the insurance company, and the other creditors. *Olmsted v. Bailey*, 35 Conn., 587. A decree of the probate court is of course as conclusive as a decree of the Supreme Court. *Gates v. Treat*, 17 Conn., 392. These parties were all in the probate court, and the acceptance of the commissioners' report is a final settlement of the whole matter.

Fourth. If the insurance company ever had the lien upon these shares, it was a claim against the estate of Griswold, and by not presenting it within the time limited the company is expressly barred by the statute from making the claim. Gen. Statutes, p. 388, § 5. If a corporation can claim liens upon items of inventoried estate and be justified in not presenting them, no estate could ever be settled.

A. P. Hyde and *C. E. Perkins*, for the defendants.

1. The insurance company claim that by virtue of the statute (Gen. Stat., p. 279, sec. 8,) they have a lien on this stock for the indebtedness of Griswold to them, not only for that contracted before the time when the stock is claimed to have been pledged to the bank, but for all contracted after that time and before the insurance company had notice of the pledge. The amount of the debts of Griswold to the insurance company fully appears from the commissioners' report on his estate, by which it appears that his indebtedness to the company, not otherwise secured than by this lien, amounts to \$46,601.28. The company claim that, by a fair construction of the 9th section of the statute, no pledge of the stock would be valid, so as to defeat their lien for any advances made by them to Griswold before they were notified of the attempted pledges as required by the act. If we are correct in our construction of these sections of the statute, it is clear that the bank is not entitled, under its pledge, to any transfer of this stock, until it shall have first paid the debt due from Griswold to the insurance company. *Vansandt v. Middlesex Co. Bank*, 26 Conn., 144; *Stebbins v. Phoenix Fire Ins. Co.*, 3 Paige,

350; *McCready v. Ramsey*, 6 Duer, 574; *Arnold v. Suffolk Bank*, 25 Barb., 424; *Rogers v. Huntington Bank*, 12 Serg. & R., 77; *Grant v. Mechanics' Bank*, 15 id., 140; *Sewall v. Lancaster Bank*, 17 id., 285.

2. The estate of Griswold being insolvent, this attempted pledge of the stock is void as against the other creditors of Griswold, and will not be enforced by a court. In the first place, the delivery of the certificates of stock with powers of attorney to the bank vested no legal title or interest in the bank. The stock could only be transferred on the books of the company. Such a power of attorney might be irrevocable by Griswold during his life, but its execution was terminated by his death, as no act can be done in the name of a dead man. After his death the pledge, if any existed, could only be enforced in a court of equity. *Hunt v. Rousmanier's Admrs.*, 8 Wheat., 201; *Watson v. King*, 4 Camp., 272; *Platt v. Hawkins*, 43 Conn., 139. The claim of the bank to this security being merely an equitable one, a court of equity will not interfere to enforce it, unless the equity of the bank is superior to that of the other creditors. This can not be claimed in the present case, inasmuch as the neglect of the bank to give notice of the pledge enabled Griswold to hold himself out to the world as the absolute owner of this stock, and thereby contract debts which are now outstanding. The claim of the bank gains no strength from the statute authorizing a pledge of stock without an actual transfer, as by their own laches they neglected to give the notice required by the statute, and so contributed to the mischief which that requirement sought to avoid. In the next place, this stock remained liable to attachment by any creditor until the death of Griswold; and it is clear that, if he had made an assignment as an insolvent debtor, his assignee would have held the stock. *Shipman v. Aetna Ins. Co.*, 29 Conn., 245. But the executor of an insolvent estate occupies the same position as such a trustee; that is, he has all the rights of creditors, as well as of the testator. In fact, in an insolvent estate there are none whose rights are represented except creditors. *Freeman v. Burnham*, 36 Conn., 470, 475; *Andrus v. Doolittle*, 11 id.,

289; *Williams v. Morehouse*, 9 id., 473. Can it be claimed, if this stock had been attached by a creditor, that, by the death, the attachment would have been dissolved for the benefit of the bank, and not for *all* the creditors whose rights are represented by the executors? Except for the provisions of the statute it would hardly be claimed that the bank could compel the executors to convey the stock to them. But much reliance is placed on the language of the act, which provides that, unless notice is given as required, such transfer shall not be effectual to hold said stock against any person "but the pledger and his executors, &c." The statute, though it speaks of the executors, clearly means to refer to them so far as they represent the debtor and not as they represent creditors. The original act of 1871 shows that the rights of creditors were the very ones intended to be protected by the requirement of notice, and in the present law the change of phraseology adopted by the revisers was intended to convey the same idea.

3. The bank has no better claim to a transfer of the hundred and forty-seven shares, under the power of attorney signed by one of the executors, than they have under those signed by Griswold. The bank surrendered the certificate for two hundred and ninety-six shares to this executor, because a part of the stock represented by that certificate did not belong to Griswold, and to enable the executor to transfer that stock to those for whom it was held in trust; and the executor, taking a new certificate for the remaining hundred and forty-seven shares in the name of the estate, returned the same with his power of attorney to the bank, in order to give them the same rights they had before, and no more. It matters little whether this was done by the executor under wrong advice or under a mistaken idea of his duty. There was no new consideration, and the bank claims to hold it as collateral security for the same debts for which it before claimed to hold it. If an executor of an insolvent estate should, in collusion with one creditor, attempt to convey the assets of the estate to such creditor, and so prefer him, to the injury of the others, a court of equity would restrain the attempt or declare the

transfer void, as the case might require. At all events, it would not lend its aid in enforcing such a transfer.

PARDEE, J. This is an amicable submission, upon an agreed statement of facts, to the Superior Court, under the statute, of matters in dispute between the Hartford Life and Annuity Insurance Company, the First National Bank, and the estate of Wareham Griswold, late of Hartford, deceased, represented by his executors; these corporations and persons being all of Hartford. The Superior Court has asked the advice of this court as to what decree shall be passed in the premises.

[After making a statement of the principal facts in the case, which is omitted, as the facts have been sufficiently stated, the opinion proceeds as follows:]

The statute (Rev. of 1875, page 279, sec. 9,) provides as follows: "Shares of stock in any corporation organized in this state under the laws of this state or of the United States, may be pledged by executing and delivering a power of attorney for their transfer, with the certificate of stock therein mentioned, to the party to whom the pledge is made; but no such pledge, unless consummated by an actual transfer of the stock to the name of such party, shall be effectual to hold such stock against any person but the pledger, and his executors and administrators, until a copy of such power of attorney shall be filed with the cashier, treasurer, or secretary of said corporation."

By virtue of the pledge by Griswold of the stock here in question to the bank and the delivery of the certificates, with powers of attorney for the transfer thereof to themselves, for the security of his indebtedness, they acquired as against him an equitable interest in it, liable however to be defeated by attachment, by levy, by transfer to a trustee in insolvency or to an assignee in bankruptcy, by his death leaving creditors whose debts could only be paid in full by the proceeds thereof, and by a lien placed thereon by a public statute. The bank had the privilege of changing this possible, contingent equitable interest into a perfected indefeasible lien for the security

of their debt. They suffered it to pass from them by omitting either to transfer the shares upon the books of the insurance company to themselves, or to give notice to that company of their lien, until after the enactment of a statute which went into operation on the first day of January, 1875, and which provides that every corporation "shall at all times have a lien upon all the stock owned by any person therein, for all debts due to it from him." Revision of 1875, page 279, sec. 8. Therefore, the bank not having previously made any transfer or given any notice, on that day there came into existence in behalf of the insurance company a statutory mortgage or pledge of the stock to themselves as security for Griswold's present indebtedness to them; and thereafter, in the absence of any notice from the bank, whenever the company made a loan to him, there simultaneously sprang up a like mortgage for the security thereof; and this without any request upon their part or any agreement upon his. Inasmuch as it is the creation of a public statute, no act upon the part of the insurance company by way of actual notice to any person or corporation was necessary to the perfection of their lien, because the statute requires none, and is itself of course constructive notice to all persons. The legal interest of the company in the shares, thus perfected by the power of a public act, must take precedence of the imperfect, because secret, interest of the bank therein.

After this eighth section went into operation whoever purchased stock in any corporation or took it in pledge as security for loans, could not be sure of his legal title as owner or of his equitable interest as pledgee until he had transferred it to himself upon the books of such corporation, or had filed the statutory notice. That statute took immediate effect upon all corporate shares then existing without regard to the fact that the various corporations had previously issued certificates representing such shares, framed in absolute terms of ownership and containing no notice of any claim for such lien; and it takes like immediate effect upon shares, the certificates for which have been issued since the enactment thereof, without stating therein any claim for such lien; for, the act does not

require corporations to embody any such notice in their respective certificates as a pre-requisite to the lien, and the court has no power to demand it; and as in contemplation of law every person has notice of the privileges conferred and obligations imposed by a public statute, whoever accepts either as purchaser or pledgee of corporate shares must consider the statutory provision for a lien as a constituent part of the certificate which he receives. And so far as it concerns the hundred and forty-seven shares which were returned to the bank with the new power of attorney, the pledge for Griswold's indebtedness to the company was by force of the statute constructively embodied in the new certificate representing them, as it had been in the former one.

By virtue of this ninth section the pledge to the bank was good as against Griswold and his heirs, without transfer of the shares or notice to the insurance company; and if upon his death these shares were not needed for the payment of debts, as against his heirs a court of equity would have enforced the pledge in favor of the bank.

Going beyond this, they urge that the statutory mortgage to the insurance company does not take precedence of the equitable interest acquired by them two years before the passage of the act giving corporations a lien upon their own shares as security for indebtedness to them from the owners thereof. The statute as originally passed in 1871 declared that stock pledged by a delivery of the certificate with a power of attorney to the pledgee should not be "protected from attachment or levy by any creditor of the owner thereof or from passing to his assignee in bankruptcy or trustee in insolvency until a copy of said power of attorney shall be filed with the cashier, treasurer, or secretary of the corporation." Session Laws of 1871, page 525. It re-appears in the Revision of 1875, page 279, section 9, declaring that "no such pledge shall be effectual to hold such stock against any person but the pledger and his executors and administrators until," &c. The words are changed but the meaning remains.

The pledge by Griswold to the bank was in 1872; after the enactment of the ninth section in 1871 it became impossible

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for the bank to acquire any vested interest in the stock as against creditors, present or future, except by a notice. The statute expressly preserves creditors' rights. If Griswold had gone into bankruptcy all debts would have shared equally in the proceeds of the stock. The statute reserved to the insurance company the right to take precedence of the bank by an attachment for the security of their debt, irrespective of the question as to when it was contracted. The bank acquired and held their interest in the stock under a statute which exposed it to all modes of attack from creditors, so long as it rested upon a secret pledge; they took that interest upon a statutory declaration that it should not become vested as against any creditor until they had filed a notice; and the act of 1875 is the exercise by the legislature of power reserved to itself in the act of 1871, and only added to attachment, levy, and assignment to trustees in insolvency, one more door of access to the stock; not a new right, but simply an additional method for enforcing one already in existence. The insurance company, seeing that no one had secured any vested interest in the stock on the first day of January, 1875, by giving the statutory notice, from that day onward had the right to refrain from obtaining other security either by pledge or attachment and to rest solely upon what the statute had done for them; presumably they did so; on that day they could have attached; practically the statute placed an attachment upon the stock in their behalf; it publicly recorded a completed lien for their security, and that would have been the precise effect of an attachment; the equity of the bank reached no farther than the person of Griswold. Conceding that the bank took a power of attorney coupled with such an interest as the lender of money has in securities thus pledged, and conceding the fullest effect otherwise to be claimed for that power in a court of equity, yet our statute declares that it shall not stand before debts present or future unless a notice is filed; and the statute gives no protection except at the price of full compliance with its requirements. There being no notice, the sole security to the bank rested upon Griswold's solvency; virtually, nothing was

added to his name. The equitable interest of the bank stands postponed to the publicly recorded lien in favor of the insurance company, by the principle which postpones an unperfected to a completed attachment, or a secret unrecorded mortgage of land to one which although later in time is recorded by a grantee who has no notice of the first.

But if this position is untenable we should be compelled to advise the Superior Court that the stock must go unencumbered into the mass of the estate for the equal benefit of all creditors. The bank, the insurance company and the executors have signed the articles of submission and are parties of record; all other creditors are parties in the person of the executors; for in the case of an insolvent estate there is no heritable interest; they represent, really, creditors alone. Upon Griswold's death the law laid its hands upon his estate; he dying insolvent the debts then due stood practically, so far forth as the secret interest of the bank is concerned, as if, living, the law had placed his estate in the hands of a trustee in insolvency; their precedence was made by the statute to depend upon a notice; in the absence of that, whenever, living, his estate goes to a trustee in insolvency, or, dying insolvent, it goes to his executor, the statute reduces the bank to the level of unsecured creditors. To repeat what we have already said, whatever at common law might have been the extent of the right conferred upon the bank as lenders of money upon this manner of pledge, the statute, so far forth as other creditors are concerned, limits it to the duration of Griswold's solvency.

Griswold having died insolvent his executors proceeded in accordance with the statutory provisions concerning insolvent estates; commissioners were appointed by the probate court to receive the claims of creditors, to determine the amount, if anything, due upon each, and to report to that court a list thereof, specifying particularly those which they allowed and those which they disallowed; and if any creditor having any security for his claim upon any property of the estate, should present that claim for allowance, it is made their duty to enquire into, determine, and report the cash value of such security.

The bank presented their claim to the commissioners, and added the statement that they had by way of security therefor a lien upon the three hundred and ninety-seven shares of stock in the insurance company; that company presented their claim but were silent as to any lien upon the same stock. The commissioners determined the amount due from the estate to these parties respectively and reported the same to the probate court; reporting likewise the value to the bank of the insurance shares as security for their debt. The court accepted the report; no appeal has been taken from it, and the statutory time for taking an appeal has passed.

The bank now urges that the finding of the commissioners and acceptance of their report by the court is a conclusive judgment upon the estate, the bank, the insurance company, and all other creditors, as parties before that court, not only as to the amount of their respective claims, but as to which has the prior lien upon the insurance shares.

This, we think, is to attribute to the commissioners powers with which they are not vested. They are a statutory tribunal, brought into existence for the single and special purpose of determining and reporting to the probate court how much, if anything, is due to each claimant, and thereby finding the aggregate of debts due from the estate; they cease to exist when this duty is performed. The issue, so far as there can be said to be an issue before a tribunal when there are no pleadings, and in a strict sense no parties, is between the estate on the one hand and the body of creditors on the other; the determination of the commissioners as to what the estate owes upon any claim presented is final, if unappealed from; their determination that a particular debt is due to *A* and not to *B* is not conclusive as between them; if the commissioners report that the debt is the property of *A* and the executor pays to him the percentage due thereon, the estate is protected from any further proceedings on the part of either of them; but if *B* can thereafter show, either in a court of equity or a court of law having general jurisdiction, that the money received by *A* was due to himself, the finding of the commissioners will not protect *A*; they are not clothed with power

to make a conclusive adjudication of *B's* right to receive the money. Again, if Griswold had executed his promissory note for \$1,000, and *A* had presented it to the commissioners as a claim in his favor, and *B* had likewise presented a claim founded upon the same note, declaring it to be his property and that *A* had unlawfully possessed himself of it, and the commissioners had heard them and had reported to the probate court that the estate owed \$900 upon the note to *A*, and no appeal had been taken from the decree accepting the report, and the executors had paid the percentage to *A*, while the decree would afford perfect protection to the executor in making the payment, it would not bar *B* from thereafter proving in a court of general jurisdiction, upon a proper proceeding, that the debt was his property and recovering from *A* the amount received by him. But *B* is concluded as to the amount, and although in his proceeding against *A* he should prove that the estate owed \$1,000 upon the note, he can recover no more from *A* than the latter received.

And the issue before the commissioners upon the estate of a living insolvent is confined to the determination of the amount of indebtedness to be paid to each claimant under the trusteeship then existing; if under that *A* presents a claim for \$1,000 and the commissioners report only \$500 to be due thereon, and he receives his percentage from the trustee upon that sum; and if at some future time the insolvent becomes possessed of property, *A* is not concluded by the report of the commissioners as to the amount of his debt, and if in a proper legal proceeding against the debtor he can prove that the debt amounted to \$1,000, he can recover the unpaid portion of that sum. Again, if the bank and the insurance company had each presented to the commissioners the whole of their respective claims against Griswold's estate, together with their several claims to a first lien upon the insurance stock, and had been heard, and the commissioners had decided the amount of the debt due to each, and had reported that the right to the benefit of the security belonged to the bank, and no appeal had been taken from the decree of the probate court affirming this report, as between the bank and the

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insurance company the whole question as to which is entitled to the first lien upon the stock is as open as before. The bank and the insurance company were each compelled to present their respective claims to the commissioners if they desired to receive a percentage above the proceeds of such securities as they might respectively hold; the allowance or disallowance of these claims of indebtedness was the issue to be determined; the application of collateral securities was merely incident to the main question; and as an accepted report from commissioners makes conclusive determinations only for the benefit of the estate and for the guidance of the executor or trustee thereof as to the payment of percentages upon proven debts and the valuation and application of pledged property, when the bank presented to this special tribunal of limited jurisdiction an unfounded claim upon the stock as security for their debt, the insurance company could ask the same tribunal to recognize their lien upon the stock, without conferring upon it the power, not otherwise possessed, of finally concluding them, as between themselves and the bank, upon that matter. Nothing is conclusively decided beyond what is necessary to effect the sole purpose of the proceeding, that is, the final settlement of the estate of a deceased insolvent, so far as the estate itself is concerned. To accomplish that it is only necessary to know the amount of its indebtedness and to certify to the executor the names of persons or corporations to whom he can safely pay percentages upon the debts allowed; it is not at all necessary to that end that it should be conclusively determined as between the bank and the insurance company that one or the other had the superior claim to the security; for the estate has not the slightest interest in that question; it owes to each more than the value of it; it cannot be helped or harmed by any result which may be reached concerning it; it owes no more, no less, either to the bank or to the insurance company; and the report made by this special tribunal should not conclusively adjudicate a matter which is neither necessary nor pertinent to the issue before it.

If we turn to the statutes creating commissioners we find
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that it is their duty "to receive and decide upon the claims of creditors of such estate;" to "report to the court a list of the claims exhibited to them, specifying particularly those allowed and those disallowed;" and if any creditor has security for his claim they are to "enquire into the cash value of such security;" these are the terms of the limited commission issued to them by the legislature.

We are reminded that the decree of a court of probate in a matter within its jurisdiction is as conclusive upon the parties as the judgment or decree of any other court; but, as the determination of the commissioners is only conclusive as to the amount of a debt and as to the person to whom the executor can safely pay a percentage thereon, and this for the benefit of the estate, the passage of the decree by the court only confirms the conclusiveness to the same extent and for the same purpose.

In *Loomis v. Eaton*, 32 Conn., 550, land was mortgaged, first, to secure a note for \$2,000 to A; second, to secure a debt to B; the mortgagor died and his estate was represented insolvent; the first mortgagee presented his claim for principal and interest to the commissioners; the administrator and the second mortgagee appeared and objected to the allowance of any interest on the ground of usury, and the commissioners allowed only the principal, rejecting the claim for interest. Subsequently, upon a proceeding for a foreclosure, the first mortgagee found entrance to a court of general jurisdiction, and it was held that the judgment of the commissioners was not conclusive upon him in that court upon the question of usury, and that he was entitled to interest; and he was allowed to take a decree of foreclosure for unpaid interest. The court says, "The fact that the respondent was present and assisted the administrator in making a defence can make no difference. He was not a party to that proceeding; and the allowance or disallowance of a claim by the commissioners could only affect the property in the hands of the administrator." And this view of the law is further illustrated and enforced in a discriminating note by the reporter.

And if, under certain circumstances, the finding of the

commissioners is not absolutely final and conclusive even as to the amount of a debt and as against the creditor who presents it, much less should their determination be always and everywhere conclusive upon the collateral and incidental question as to who has the best claim to a given security.

A few days after the death of Griswold, upon the request of H. A. Whitman, one of the executors, the bank delivered to him the certificate for two hundred and ninety-six shares of the insurance stock, and consented that he should transfer one hundred and forty-nine shares thereof to certain persons for whom Griswold had held the same in trust; the insurance company permitted him to make the transfer upon their books, and issued a new certificate for the remaining hundred and forty-seven shares in the name of the estate of Griswold, which certificate Whitman delivered to the bank with his power of attorney as executor to transfer to themselves; and he also transferred twenty-two shares of Providence screw stock to them. The insurance company also permitted Whitman as executor to make several transfers of shares of their stock which stood in Griswold's name and were not pledged to the bank, upon Whitman's declaration that Griswold was not the owner thereof, but held them only in trust. On the 17th day of January, 1876, the bank delivered to the insurance company copies of all the powers of attorney, and asked leave to transfer the shares to themselves in pursuance thereof; the company refused to permit the bank to make the transfer, but remained silent concerning any claim to a lien thereon in their own behalf.

The bank insists that the insurance company, by their failure to assert their claim of lien when they refused permission to the bank to transfer the shares, when the executor made transfers, when they issued new certificates in the name of the estate for a part thereof, and when they presented their debt to the commissioners with a list of securities therefor, omitting any mention of their claim of lien upon these shares, by neglecting to oppose before the commissioners the claim made by the bank to a lien upon them and by neglecting to take an appeal from their action in reporting the value of the

shares as a security applicable to the debt of the bank, have waived in favor of the bank all right to the lien now asserted by them.

A waiver is the intentional relinquishment of a known right. Intent is an operation of the mind and is to be proven and found as a fact, rarely or never to be inferred as a matter of law. The finding being silent as to the existence of such intent, it is not within the power of this court to find it as an additional fact and impute it to the insurance company.

Upon these principles, the executors will be protected in making the application of the ascertained value of the stock upon the debt of the bank, and in paying to them the general percentage upon the remainder; and in paying to the insurance company the percentage upon their entire debt. But, inasmuch as by our determination of the question submitted to us, as between these parties the insurance company are found to have the first lien upon the stock and are entitled to have the value thereof applied upon their debt and to receive a percentage upon the remainder only, the executors should transfer the three hundred and ninety-seven shares of the stock to the insurance company, and the latter should pay over to the bank the percentage paid to them by the executors upon the sum of \$31,760, that being the value of the stock as ascertained by the commissioners.

We advise the Superior Court that the Hartford Life and Annuity Insurance Company has the first lien upon the stock in question.

In this opinion the other judges concurred; except LOOMIS, J., who did not sit.

45	44
63	162

45	44
78	840

45	44
75	724

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JAMES B. STONE *vs.* ASA G. HILLS AND OTHERS.

The defendants, who were paper manufacturers, sent their servant with a team belonging to them to deliver a load of paper to one T, four miles distant, directing him to return thence to the mill by a particular route, getting a load

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of wood on his way. When he arrived *T* requested him to go on with the paper to a warehouse at *H*, four miles farther, and to get some freight at the railway station in *H*, pay the freight bill and bring the freight to him. The servant drove to *H*, and while at the railway station there left his horses unhitched and unattended, and they ran away and injured the property of the plaintiff. Held that the servant was not to be regarded as at the time in the employment of the defendants, and that they were not liable.

TRESPASS ON THE CASE, for an injury by reason of the negligence of the defendants' servant; brought before a justice of the peace, and appealed by the defendants to the Court of Common Pleas of Hartford County, and there tried to the court on the general issue, before *McManus, J.* The court made the following finding of facts:

On the first day of March, 1876, the defendants were operators of a paper-mill in the town of Glastonbury and had in their employment one Smith, as a driver of their team. On that day they directed him to carry a load of paper from the mill and deliver it to one Taylor at a point in the same town four and a half miles distant, and to return from thence by way of Nipsic with a load of wood. On reaching Taylor's, the latter requested Smith to deliver the paper at the warehouse of Tracy & Co. in the city of Hartford, four and a half miles distant from Taylor's, and to go from thence to a railway freight station in the city and get some freight belonging to Taylor and transport the same to his place. Smith acceded to Taylor's request, and while in the railway station paying Taylor's freight bill, the horses, which he had negligently left unhitched and unattended, being frightened by a passing train, ran up the street and against the plaintiff's wagon, and injured it to the extent of \$18.42, besides making it necessary for him to expend \$6 in addition for the use of another wagon.

The court, upon these facts, rendered judgment for the plaintiff, and the defendants brought the case before this court by a motion in error.

W. S. Goslee, for the plaintiffs in error.

Smith was not, at the time of the injury complained of, the servant of the defendants, or acting "within the fair scope of their order, direction and authority." Chitty on Contracts,

640; *Martin v. Temperly*, 4 Adol. & Ell. (N. S.) 312. The course he pursued and the route he took were his own willful acts, done upon his own responsibility, or at best on the suggestion or request of a third party. "It was not in pursuance and within the scope of the business entrusted to him." Chitty on Contracts, 648, 649, and note on p. 650; 1 Black. Com., 431; *Sleath v. Wilson*, 9 Car. & P., 607; *Lamb v. Palk*, id., 629; *Joel v. Morrison*, 6 id., 501; *Mitchell v. Crassweller*, 13 Com. B., 237; *Storey v. Ashton*, L. Reps. 4 Queen's Bench, 476; *Bard v. Yohn*, 26 Penn. S. R., 482; *Howe v. Neumarch*, 12 Allen, 49; *Stevens v. Armstrong*, 2 Seld., 435; *Church v. Mansfield*, 20 Conn., 287. Smith being engaged in business of his own, and acting entirely contrary to his duty to the defendants, his course being a total departure, not a different route between the places where he was directed by them to go and return, they are not responsible for the results of his negligence in this case.

C. H. Owen, for the defendant in error.

1. A principal is liable for the negligence of his agent, even though the conduct of the agent is without his participation or consent, provided the act is done in the course of the employment and is not a willful departure from it. *Thames Steamboat Co. v. Housatonic R. R. Co.*, 24 Conn., 54; *Phelon v. Stiles*, 43 id., 426; *Johnson v. Barber*, 5 Gilman, 425; *Wright v. Wilcox*, 19 Wend., 343; *Wiswall v. Brinson*, 10 Ired. Law, 554. The majority of the court in the last case give as the reason of the master's responsibility, his power of selection. See also 1 Parsons Mar. Law, 378, 387. The master is liable, though the servant or driver be out of the direct route for purposes of his own, and contrary to instructions, because he put it in the power of the servant to do the injury. 1 Swift Dig., 67; *Sleath v. Wilson*, 9 Car. & P., 607; *Phila. & Reading R. R. Co. v. Derby*, 14 How., 468, 486.

2. The employment of Smith by the defendants is a question of mixed law and fact. *Redding v. So. Carolina R. R. Co.*, 3 So. Car., 1, and cases cited. It is found that Smith

was in their employment as a driver. "Carriers by land usually deliver the goods by carrying them to the owner or *where he directs*." 2 Parsons Cont., 188; *Richardson v. Goddard*, 23 How., 39. And it was for the benefit of the defendants that the consignee loaded Smith's team with return freight. 1 Parsons Mar. Law, 381. And in the absence of evidence that this benefit was renounced, the defendants are to be considered as accepting it, and as adopting his acts as those of their servant. *Id.*, 383. See also Wood on Law of Master & Servant, §§ 277, 282, 287, 288, 295, 307.

PARDEE, J. The rule is that for all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible. We cite a few from the many cases in which this rule has been judicially illustrated and applied.

In *Mitchell v. Crassweller*, 13 C. B., 237, the defendant's carman having finished the business of the day returned to their shop in Welbeck street with their horse and cart, and obtained the key of the stable, which was close at hand; but instead of going there at once and putting up the horse, as was his duty, he drove to Euston Square, and on his way back negligently drove over the plaintiff; and it was held that the carman was not at the time engaged in his master's business so as to make him liable. Maule, J., said: "At the time of the accident the servant was not going a roundabout way to the stable, and as one of the cases expresses it, making a detour. He was not engaged in the business of his employer. But in violation of his duty, so far from doing what he was employed to do, he did something totally inconsistent with his duty, a thing having no connection whatever with

his employer's service. The servant only is liable and not the employer. All the cases are reconcilable with that. The master is liable even though the servant in the performance of his duty is guilty of a deviation or failure to perform it in the strictest and most convenient manner. But when the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it." In *Storey v. Ashton*, L. Reps. 4 Queen's Bench, 476, the defendant intrusted his servant with his horse and cart for the day, and when his work was ended and it was his duty to drive home, he, for a purpose of his own and without authority express or implied from his master, drove in an entirely different direction and by his carelessness injured the plaintiff. The court held that the master was not liable.

In *Sleath v. Wilson*, 9 Car. & P., 607, Erskine, J., said in his charge to the jury: "But whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. * * The master in such a case will be liable, and the ground is, that he has put it in the servant's power to mismanage the carriage by intrusting him with it." In *Storey v. Ashton*, Cockburn, C. J., said: "I think the judgment of Maule and Cresswell, J. J., in *Mitchell v. Cressweller*, expresses the true view of the law, and the view which we ought to abide by; and that we cannot adopt the view of Erskine, J., in *Sleath v. Wilson*, that it is because the master has intrusted the servant with the control of the horse and cart that the master is responsible. The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases it is a question of degree as to how far the deviation could be

considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment. It is true that in *Mitchell v. Crassweller* the servant had got nearly if not quite home, while, in the present case, the carman was a quarter of a mile from home; but still, he started on what may be considered a new journey entirely for his own business, as distinct from that of his master; and it would be going too far to say that under such circumstances the master was liable." In the same case, Mellor, J., said: "But here, though the carman started on his master's business, and had delivered the wine and collected the empty bottles, when he had got within a quarter of a mile from the defendant's office he proceeded in a directly opposite direction, and as soon as he started in that direction he was doing nothing for his master; on the contrary, every step he drove was away from his duty." In *Cormack v. Digby*, Irish Reports, 9 Com. Law Series, 557, a servant had leave from the master to go for the day to a neighboring town to transact business of his own, and borrowed his master's horse and cart for the purpose; he afterwards proposed, and the master assented, that he should bring home some meat from the town for the master; by negligent driving he injured the plaintiff. Held, in an action against the master for the negligence of the servant, that the court could not hold as matter of law, upon the evidence, that the master was responsible for the negligence of the servant.

In *Lamb v. Palk*, 9 Car. & P., 629, where a servant driving his master's horse got off the carriage and took hold of a horse standing before a van and caused the van to move so as to make room for the carriage to pass, whereby a packing case fell from the van and broke the thills of the plaintiff's gig, it was held that the master was not liable for the injury. In *Woodman v. Joiner*, 10 Jur., N. S., 852, the plaintiff permitted the defendant to use his shed temporarily as a carpenter's shop, and the defendant's workman in lighting his pipe set the shed on fire; the court held that the defendant was not liable in an action for negligence, saying, "We have had much

doubt upon this question, but have all arrived at the conclusion that there is no liability. If the servant had been guilty of any *negligence relating to his employment*, it may be that the defendant would have been liable." In *Campbell v. City of Providence*, 9 R. Isl., 262, the defendant, a hack owner, employed a person as a day driver. He used the hack at night without the master's consent or knowledge. Held that the master could not be held responsible for an omission on the part of the driver to comply with the terms of a city ordinance during the time of such unauthorized use of the hack.

In *Howe v. Newmarch*, 12 Allen, 49, Hoar, J., while holding the defendant responsible for the servant's negligence in executing the master's orders, says: "And in an action of tort, in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable."

In *Wilson v. Peverly*, 2 N. Hamp., 548, a fire was set upon the land of the defendant by his orders and the charge of it given to a hired laborer; the defendant then left home, directing the laborer, after setting the fire, to employ himself in harrowing other land of his; but the laborer, before he commenced harrowing, undertook to carry brands from the first fire into the ploughing field for the purpose of consuming piles of wood and brush there collected, and in so doing dropped coals of fire from which fire communicated to the plaintiff's land and injured it. The jury found that the manner of carrying the fire was dangerous and not in conformity to any express directions of the master, and that the laborer was accustomed to work under the particular directions of the defendant and could conveniently have harrowed without first burning the piles of wood; though to burn them first is the usual course of good husbandry. In affirming a judgment for the defendant the court, in the course of the opinion,

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says that the master is not liable for "wrongs caused by carelessness in the performance of an act not directed by the master; as a piece of business of some third person, or of the servant himself, or of the master, but which the master did not, either expressly or impliedly, direct him to perform. * * * * * Thus a piece of labor might be very safely performed at one time and not at another, as in this case of the setting of a fire in the neighborhood of much combustible matter, and if the master, when the fire would be highly dangerous in such a place, forbore to direct it to be kindled, and employed his servant in other business, it would be unreasonable to make him liable, if the servant before attending to that business went in his own discretion and kindled the fire to the damage of third persons."

In the case before us the servant left the employers' premises under precise instructions as to the place to which their team was to be driven and as to the merchandize to be transported; and under instructions equally precise as to the route to be taken in returning and as to what he should bring home. These therefore covered the entire period of his contemplated absence; nothing was left to his option or discretion; nothing to chance; and in fact the deviation was not occasioned or even suggested by any unforeseen event in connection with the employers' business; the record shows no obligation, express or implied, upon them to deliver the paper elsewhere than in North Glastonbury, nor that the journey thence to Hartford, even if successfully accomplished, would have been for their advantage or profit; it was not connected with, did not grow out of, did not contribute to, the successful completion of their business. When therefore the servant accepted instructions from Taylor and became a carrier of merchandize for him to and from a railroad station in an adjoining town, he temporarily threw off his employers' authority, abandoned their business and left their service. They are not responsible for his negligence on this occasion. There is error in the judgment complained of.

In this opinion the other judges concurred; except LOOMIS, J., who did not sit.

SAMUEL S. STRONG *vs.* DANIEL B. NILES AND OTHERS.

A debt of a copartnership is also the joint and several debt of the individual partners.

A firm was dissolved and a part of its members as a new firm went on with the business. The plaintiff, who had been a book-keeper of the old firm, kept on with the new, and carried a balance due him for services from the old firm into his account with the new; and his account thus made up was afterwards paid by the new firm, they not knowing that it embraced any part of the old account. Held that, as the members of the new firm were personally liable for the debts of the old, the plaintiff was entitled to retain the money so received.

ASSUMPSIT, brought to the Superior Court in Middlesex County, and tried to the court, on the general issue, with notice of a set-off, before *Hitchcock, J.* Facts found and judgment rendered for the plaintiff, and motion in error by defendants. The case is sufficiently stated in the opinion.

L. Hall, for plaintiffs in error.

A. B. Calef, for defendant in error.

GRANGER, J. The plaintiff's claim in this case consists of a note of one hundred dollars, dated February 1st, 1873, given to him by the defendants, and of a balance of account claimed by the plaintiff against the defendants, of one hundred dollars and seventy-six cents. At the time the note was given the defendants paid the plaintiff sixty-one dollars and ninety cents in cash, and in relation to this payment the principal controversy arises, and upon the following facts.

Some time prior to February 1st, 1873, the date of the note, a manufacturing copartnership was doing business in Chatham, under the name of Niles, Parmalee & Co., in whose employment as book keeper the plaintiff had been for some time. This firm was composed of Daniel B. Niles, H. E. Niles, J. J. Niles, and A. N. Niles, the present defendants, and several other persons, and was dissolved some time prior to that date, all the partners except the defendants retiring,

and taking from the old firm their interest therein. The business after that time was continued by the defendants as a new and distinct copartnership, under the name of D. B. Niles & Sons. On the 1st of February, 1873, the plaintiff went into the employment of the defendants as book-keeper, and continued in their employment till about February 1st, 1876, under a salary averaging one thousand dollars per year, with no fixed time for its payment.

On the 1st of February, 1873, when the plaintiff entered into the employment of the defendants, the old firm of Niles, Parmalee & Co. was indebted to him in the sum of one hundred and sixty-one dollars and ninety cents, balance of account. This balance the plaintiff, without authority from the defendants, and without their knowledge, on 1st day of February, 1873, passed to his credit in his account with the defendants, and it was mingled with and carried forward in his account till the 24th of March, 1874, when the plaintiff struck a balance in the accounts between himself and the defendants up to the 1st of February, 1874, the balance appearing to be three hundred dollars, into which balance the debt brought forward and transferred from the account of Niles, Parmalee & Co. entered. The plaintiff thereupon informed the defendants, who trusted him in the matter, that there was a balance of account due him from them of three hundred dollars, and they not knowing of the transfer of the old account and believing the three hundred dollars to be wholly the indebtedness of D. B. Niles & Sons, executed to the plaintiff the note for one hundred dollars in question, and paid him the balance of the three hundred dollars in cash; which balance contained sixty-one dollars and ninety cents of the old debt transferred by him from the account of Niles, Parmalee & Co. and passed to his credit in account with the defendants; and thus the plaintiff received of the defendants the balance of one hundred and sixty-one dollars and ninety cents due him from the old firm, sixty-one dollars and ninety cents being received in cash, and one hundred dollars of it being the note in question. The plaintiff sought to recover on the note in this action, but the court decided against him. Regarding the sixty-one dol-

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lars and ninety cents, the defendants claimed that it should be deducted from the plaintiff's account, as so much money belonging to them, but the court decided that the plaintiff might lawfully retain the money thus paid, and rendered judgment for him accordingly.

The defendants bring the case here by motion in error, and the only question is, whether the court below was correct in holding that the plaintiff might lawfully retain the sixty-one dollars and ninety cents.

The finding conclusively shows that this amount was honestly due the plaintiff from the old firm of Niles, Parmalee & Co., of which firm all the present defendants were members; and by reason of being members of such firm they were of course, by the law of partnership, liable jointly and severally to pay the plaintiff his claim; and although the defendants paid this sum without knowledge that it was a debt of the old firm, yet as it was their duty to pay it, and it being justly due to the plaintiff, we think it was not against equity and good conscience for him to retain the money.

There is no error in the judgment complained of, and it is affirmed.

In this opinion the other judges concurred; except LOOMIS, J., who did not sit.



**EDWARD S. SHEPARD vs. THE NEW HAVEN & NORTHAMPTON
COMPANY.**

The plaintiff, in an action against a railroad company for an injury to him as a passenger by reason of the negligence of the defendants, averred in his declaration "that while the train was in rapid motion, he, actuated by a reasonable fear of the loss of his life if he remained on the train, and in view of an apparently unavoidable collision with another train of the defendants on the same track, and impelled by ordinary prudence, jumped from the train to escape the collision and was injured by violent contact with the ground, and that immediately afterwards the trains collided with great force." Held that the plaintiff could not introduce evidence that he remained on the train and was injured by the collision.

45	54
63	274
63	419
63	456
45	54
64	490
45	54
65	318
45	54
69	556
45	54
71	80
71	198
45	54
74	49
45	54
77	340

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And held that the evidence was not rendered admissible by the fact that the defendants had suffered a default, and the case was being heard in damages. The admission by a default is only of the cause of action stated in the declaration.

TRESPASS ON THE CASE for an injury to the plaintiff by reason of the negligence of the defendants; brought to the Superior Court in Tolland County. The defendants suffered a default, and on the hearing in damages before a committee the facts were found and the damages assessed, upon one view of the law at \$300, and upon another at \$10. The court (*Culver, J.*) accepted the report and rendered judgment for the plaintiff to recover \$300 damages. The defendants brought the record before this court by a motion in error. The case is sufficiently stated in the opinion.

C. E. Perkins and *W. C. Case*, for the plaintiffs in error, cited *Lund v. Tyngsborough*, 11 Cush., 563; *Shaw v. Boston & Worcester R. R. Co.*, 8 Gray, 45, 76; *Graves v. Severens*, 40 Verm., 636.

A. P. Hyde, for the defendant in error, cited *House v. Metcalf*, 27 Conn., 632; *Lamphear v. Buckingham*, 33 id., 250; 1 Chitty Pl., 291; *Phillips Construction Co. v. Seymour*, 91 U. S. Rep., 646, 654; *Hancock v. Southall*, 4 Dowl. & Ry., 202.

PARDEE, J. On the 8th of October, 1870, the defendants undertook for hire to carry the plaintiff safely over a portion of their railroad. He instituted this suit against them for an alleged failure in the discharge of their duty in this respect, and in his declaration described the nature and manner of the wrong in the following words: "While said train was in rapid motion, he, actuated by a reasonable fear of the loss of his life by remaining on said train, and in view of an apparently unavoidable and inevitable collision with another train of cars with its engine, the same also being the property of the defendants and under the management and control of their agents, advancing upon the same line of track on said road and in a contrary direction rapidly approaching the car or train upon which he was as aforesaid being conveyed, was

impelled through actual and ordinary prudence to jump, to deliver himself from said train; that he did so jump, and deliver his life from a most threatening and dangerous exposure, and that immediately thereafter both of the aforesaid trains collided with great violence, to the terror and injury of his fellow-passengers. And he further says that as the direct consequence of his necessary act in thus perilously jumping from the aforesaid train in manner as aforesaid, he did then and there receive from contact with the ground and through the said laches of said defendants, certain severe cuts and contusions and certain painful and grievous internal injuries, &c."

The defendants suffered a default, and asked to be heard in damages; and the hearing was by a committee. The proof was that the plaintiff remained and received his injuries within the car. The committee reported that if, upon the foregoing facts, the plaintiff was entitled to full damages, these were assessed at \$300; if to nominal damages only, the assessment should be ten dollars. The Superior Court accepted the report and rendered judgment for the plaintiff for \$300 damages and costs. The defendants moved for a new trial for the following reasons: first, because the only cause of action set out in the declaration is, that to avoid imminent danger arising from the negligence of the defendants the plaintiff leaped from the cars and was thereby injured, and this is found to be untrue; second, because he was not injured in manner and form set out in the declaration, but in an entirely different manner, of which the defendants had no notice; third, because the plaintiff was guilty of negligence contributing to the injury, and was therefore entitled to nominal damages only.

Every allegation essential to the issue must be proved in the form stated; the fact proven must be legally identical with the claim put forth; and this for the defendants' protection; first, that he may know the charge which he is to meet; secondly, if he is unable to disprove it, that the verdict and judgment may protect him from another action based upon the same wrong; of course therefore, where the evidence dis-

proves the substance of the charge the case falls. And, although it is true that the line of separation between that which is merely unnecessary description and that which is essential in pleading, often becomes almost a lost boundary, yet it is plainly perceptible in this case. The allegation that the plaintiff was impelled through actual and ordinary prudence to jump from the car, that he did jump and deliver his life from a most threatening and dangerous exposure, and that, as a direct consequence of this act, he received severe cuts from contact with the ground, constitutes his complaint; this taken from the declaration there remains a form of words empty of any charge of legal duty neglected or wrong inflicted. Even the particular that he was injured by contact with the ground is so inseparably connected by the mode of statement with that which is essential, that it must be retained and proved. He declares that it was the direct consequence of the act of jumping, and the proof is that he performed no such act. This is not only to withhold information, but it is calculated to lead the defendants away from the truth. Of course, injuries inflicted in the manner shown by the proof and in that set forth in the declaration would each give the plaintiff a cause of action; so it would be a breach of the defendants' contract to carry him safely if in placing him in a seat their servants had carelessly broken his arm, or if they had negligently dropped a trunk upon and crushed his foot; and it would be no more without the limits of permissible variance to accept proof of such injuries under this declaration than to accept proof that he did not jump from the car at all.

If upon these pleadings the plaintiff is permitted to retain this judgment, and should bring an action against these defendants for injuries sustained by him while within the car as the result of a collision, it is difficult to perceive in what manner they could avail themselves of the first, by way of protection against a second judgment. For, although modern decisions have opened the door for the admission of extrinsic evidence consistent with the record, as to what was necessarily determined in a former suit, we are not aware that they

have gone so far as to allow the defendants to prove by such evidence upon the trial of the second suit, that a cause of action which is entirely inconsistent with the declaration in the former case, is necessary to the existence of the judgment therein and constitutes in fact the only basis upon which it stands. Not having in mind any decision or discussion even upon this point, we leave it undetermined.

In *Lund v. Tyngsborough*, 11 Cush., 563, the court held that an averment in a declaration that a party was violently thrown from a wagon upon the ground by reason of a defect in the highway, is not supported by proof that he voluntarily leaped from the wagon to avoid coming in contact with such defect. In *Shaw v. Boston & Worcester Railroad Company*, 8 Gray, 45, the court held that an averment in the declaration that the plaintiff was struck by the defendants' locomotive engine while traveling in the highway, is not sustained by proof that, by means of their negligence in the management of their train, the plaintiff's horse was frightened, and ran or was driven out of the highway five or six rods before reaching the railroad crossing, upon land owned by the defendants, and that the plaintiff was there struck while attempting to cross the railroad.

The plaintiff urges that, inasmuch as the defendants by their omission to deny the averments of the declaration admitted the cause of action and every material element of it, of which negligence is one, they thereby waived all objection to his proof as to the manner of the accident. This conclusion we cannot accept.

The defendants, by their omission to deny them, are held to have admitted the truth of all well pleaded material allegations in the declaration, and the consequent right of the plaintiff to a judgment for a limited sum, that is, for nominal damages and costs, without the introduction of evidence. This is the extent of the advantage gained by the plaintiff from that omission; if he is not satisfied with nominal, and seeks greater damages, he must proceed to prove the amount, and the declaration, so far forth as the increased amount is concerned, remains subject to the rules of pleading and evi-

 White v. Washington School District.

dence, and the proof must follow the allegations as closely as if the case stood upon the general issue. If therefore, in proving the greater damages, the plaintiff proves that they resulted entirely from a wrong which he has not declared upon, this evidence forces him back to the nominal judgment. So far as this proceeding is concerned he has suffered no damage from a wrong upon which he has not based his action.

The conclusion which we have reached renders it unnecessary to discuss the remaining questions presented by the record.

There should be a new trial.

In this opinion the other judges concurred.



45	59
74	89

WILLIAM S. WHITE *vs.* THE WASHINGTON SCHOOL DISTRICT.

A *scire facias* upon a process of foreign attachment is a "suit at law," within the meaning of the charter of the city of Hartford, which provides for an appeal of suits at law from the City Court to the Superior Court.

SCIRE FACIAS upon a process of foreign attachment; brought to the City Court of the city of Hartford, and appealed by the defendants from the judgment of that court to the Superior Court for Hartford County. In the latter court the plaintiff moved that the case be erased from the docket on the ground that it was not appealable from the City Court, but the court (*Sanford, J.*) denied the motion, and at a later term judgment having been rendered for the defendants, the plaintiff brought the case before this court by a motion in error, assigning as error the denial of the motion that the case be erased from the docket.

G. G. Sill, for the plaintiff, contended that the *scire facias* was not a "suit at law," within the meaning of the 11th section of the charter of the city, which provides for appeals of suits from the City Court to the Superior Court; citing *Sher-*

wood v. *Stevenson*, 25 Conn., 438, *Day v. Wells*, 81 id., 344, and *Smyth v. Ripley*, 32 id., 156.

C. J. Cole, for the defendants, cited *Ensworth v. Davenport*, 9 Conn., 392; *Smyth v. Ripley*, 33 Conn., 311; *Fenner v. Evans*, 1 T. R., 267; *Grey v. Jones*, 2 Wils., 251; *Pultney v. Townsen*, 2 W. Bla., 1227; 2 Tidd's Prac., 1046; *Bibo v. Allen*, 4 Heisk., 81; *Swancy v. Scott*, 9 Humph., 340; *Bryant v. Smith*, 7 Coldw., 113; *State Bank v. Vance*, 9 Yerg., 475.

~~GRANGER~~, J. The only question in the present case is, whether the defendants had a right to appeal from the judgment of the City Court to the Superior Court.

The right of appeal from the City Court is regulated by the charter of the city, by which it is provided that "an appeal shall be allowed and certified in due form of law, at the first term to which any suit at law is returnable, and before trial to the jury, from the judgment or determination of said City Court in such suit, when the matter in demand exceeds one hundred dollars, to the next Superior Court to be holden in Hartford County."

If the proceeding called scire facias is a suit at law, there can be no question that the appeal was properly taken, and the court committed no error in refusing to grant the plaintiff's motion to erase the case from the docket for want of jurisdiction.

That a scire facias is a suit at law within the meaning of the charter we have no doubt. It is proceeded with in all respects as a suit at law. The writ is issued by the clerk of the court which rendered the original judgment, it contains a summons to the defendant to appear and answer, and upon it property may be attached; and although it is not an original writ, but a judicial writ, still "it is an action, it may be pleaded to as an action, and may be released by a release of all actions." WILLIAMS, J., in *Ensworth v. Davenport*, 9 Conn., 392; and see cases there cited. Judge SWIFT, (1 Swift's Digest, 731,) says: "If the garnishee makes default

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of appearance, or refuses to disclose what goods, &c., he had in his hands at the time of the service of the original writ, judgment may be rendered against him as of his own proper debt. The defendant may appear and plead any proper plea in his defense, and under the general issue the case may be tried to the jury."

The case of *Smyth v. Ripley*, 33 Conn., 311, fully sustains the claim of the defendants that a scire facias is an action at law. Actions at law and suits at law are synonymous terms; they are one and the same thing. In the General Statutes writs of scire facias are classified under the head of civil actions, and it is provided (page 396, sec. 1,) that "mesne process shall lie in actions at law, including writs of scire facias, a writ of summons or attachment, &c."

We find no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

45	61
60	477
45	61
65	159
45	61
70	294
45	61
75	713

AUSTIN C. DUNHAM AND OTHERS, EXECUTORS, *vs.* JAMES P. AVERILL AND OTHERS.

A testator gave a legacy to "The American & Foreign Bible Society." It appeared that there was an incorporated society of that name for the distribution of the Bible, established and mainly supported by the Baptist denomination; and another, incorporated earlier for the same general purpose, named "The American Bible Society," which was mainly supported by the Congregational and Presbyterian denominations. The latter society was sometimes called "The American & Foreign Bible Society," but there was no evidence that it was as well known by that name as the other society, and none that the testator had ever called it or heard it called by that name. Both societies were in the habit of soliciting contributions for their work from the neighborhood where the testator lived. The testator's denominational associations and preferences were wholly with the Congregationalists and he had no special sympathy with the Baptist denomination. Held that evidence was not admissible, upon a claim of the American Bible Society to the legacy, that while the will was being drawn the testator said to the scrivener that he wished to give the money to the Bible society sustained by the Congregationalists and Presbyterians; that he was not sure as to its corporate name, but believed it to be "The American & Foreign Bible Society."

The name used in the will being perfectly descriptive and plainly written, and there being nothing in the will to suggest any different intention from that expressed, the court would not be warranted in intermeddling, even though satisfied that the testator did in fact make a mistake.

The testator gave a legacy to "The American & Foreign Missionary Society."

There was no missionary society of that name, but "The American Board of Commissioners for Foreign Missions" was a long established incorporated society for the purpose of carrying the gospel to heathen lands, was supported by persons belonging to the Congregational order, and had received annual contributions from the Congregational society of which the testator was a member, and he had been a liberal contributor to its funds. No other society carrying on the same work was connected with the Congregational order in the state, and this society was frequently called, in the vicinity where the testator lived, by the name used in the will. Held that the American Board of Commissioners for Foreign Missions was entitled to the legacy.

Where a name used in a devise or legacy as that of a corporation does not designate with precision any corporation, but circumstances concur to indicate that a particular one was intended, and no conclusive circumstances appear to distinguish or identify any other, the one thus shown to be intended will take.

The testator bequeathed to the Hartford Hospital a reversionary interest in certain sums given to sundry persons as annuities, and in another section of the will certain lands in Ohio. By a codicil made a few months later he revoked "all devises in said will beneficial to the Hartford Hospital," and made a new bequest of \$5,000. The Hartford Hospital, for the purpose of showing that the bequest of the annuity money was not intended to be revoked, offered evidence to prove that the lawyer who drew the will, afterwards and before the codicil was drawn, informed him that by the law of Ohio a bequest or devise to a corporation made within twelve months before the death of the testator was void, and that another lawyer who drew the codicil, on being informed of the facts with regard to the devise of the Ohio land, asked the testator if that was all he had given the hospital, and he replied that it was. The court below found, if this evidence was admissible, that while the testator intended to revoke all provision made in his will for the Hartford Hospital, and to substitute therefor the legacy of \$5,000, yet he did not at the time have in mind the fact that he had made a bequest of the annuity money to the hospital, and his attention was directed only to the devise of the Ohio land. Held that the evidence was not admissible.

Where a testator by a codicil revokes a devise or legacy, and grounds such revocation on the assumption of a fact which proves not to exist, the revocation is regarded as contingent upon the existence of such fact and does not take effect.

But the courts will not set aside such a revocation where it does not appear by the will itself that it was made under the belief of the existence of such fact.

The bequest to the Hartford Hospital of the reversionary interest in the annuity money, was to create a fund of which the interest should be paid out to persons discharged from the hospital, who should be destitute and worthy of aid. The revocation in the codicil was "of all devises beneficial to the Hartford Hospital." Held that the bequest, though for the direct benefit of persons leaving the hospital, was yet to be regarded as beneficial to the hospital.

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The testator gave to *A* a legacy of \$3,000. The will was made in 1874. In 1872 the testator had given *A* \$3,000, and taken from him the following receipt: "Oct. 1, 1872. Received of *J. R.* three thousand dollars in anticipation and discharge of any legacy bequeathed to me by said *R* by his will of prior date." Held that the payment of the \$3,000 did not constitute an advancement on account of the legacy given by the will of 1874, the receipt limiting its application to a will of prior date.

And when the testator upon having his will re-drafted chose to renew the legacy to *A* given by such prior will, he was to be presumed to have done so in view of all the facts.

PETITION IN EQUITY, by the executors of James Root, for advice as to the proper construction of his will; brought to the Superior Court in Hartford County, and reserved, upon facts found, for the advice of this court. The case is fully stated in the opinion.

J. C. Parsons, for the executors.

R. D. Hubbard, for Laura B. Dunham, residuary legatee and devisee.

C. E. Perkins, for J. P. Averill.

L. E. Stanton, for the American & Foreign Bible Society.

L. P. Waldo and *A. P. Hyde*, for the American Bible Society and the American Board of Commissioners for Foreign Missions.

H. C. Robinson, for the Hartford Hospital.

PARDEE, J. James Root, of Hartford, died on the 17th day of April, 1875, having made a will upon the 14th day of July, 1874. Austin C. Dunham and John C. Parsons, of Hartford, and Loren Prentiss, of Ohio, who were named therein as executors, have brought their petition to the Superior Court, in which they say that two corporations, to wit, the American Bible Society and the American and Foreign Bible Society claim the same legacy; that the corporation known as the Hartford Hospital claims to be entitled to a legacy under the tenth clause of the will, whereas the executors are of opinion that the same was revoked by a clause in

the codicil; that a corporation known as the American Board of Commissioners for Foreign Missions claims that a legacy given to the American and Foreign Missionary Society was intended for themselves; and that they are in doubt as to their duty in respect to a legacy given to James P. Averill; and they have asked the Superior Court for instructions as to their duty in the premises; and that court has reserved the several questions for the advice of this court.

First—as to the question between the American Bible Society and the American and Foreign Bible Society.

The clause in the will upon which this question arises, is as follows:

“*Eleventh.* I give and devise to the American Home Missionary Society, five thousand dollars; to the American and Foreign Missionary Society, three thousand dollars; to the American and Foreign Bible Society, fifteen hundred dollars; to the American Seaman’s Friend Society, five thousand dollars; and to the Children’s Aid Society of the Five Points, New York, three thousand dollars.”

A society chartered and organized for the distribution of the Bible, and bearing the name of The American and Foreign Bible Society was made a respondent and filed an answer setting forth its claims to the legacy. Another society chartered and organized for substantially the same purpose, and bearing the name of The American Bible Society, was also made a respondent, and filed an answer claiming the legacy to have been intended for itself.

On the trial before the court below of the issue formed by the answers of the American Bible Society and the American and Foreign Bible Society, the American Bible Society offered evidence to prove the following allegations in its answer, to wit:

1st. That the American Bible Society has been and is known by the following names and designations, to wit:—The American Bible Society, The American Bible Society for Foreign Distribution, and The American and Foreign Bible Society.

2d. That while the scrivener was engaged drawing the

will in question, Mr. Root said to him that he wished to give to the Bible Society sustained by the Presbyterians and Congregationalists the sum of fifteen hundred dollars; that he was not sure as to its corporate name, but believed it to be the American and Foreign Bible Society; and that this name was used by the testator as and for the name of this respondent, and that it is descriptive of the character and objects of this association and the work it was constituted to perform.

3d. That Mr. Root, the testator, in his life-time, was a regular attendant on public worship at the churches and religious meetings of the Congregational order, and was never in especial sympathy with any church or society of the Baptist denomination.

4th. That the legacy in the eleventh clause of the will, being a gift of the sum of fifteen hundred dollars to the American and Foreign Bible Society, was intended by the testator to be and is a gift to the American Bible Society.

The American Bible Society claimed that this evidence was admissible to show that the name, the American and Foreign Bible Society, was inserted in this will by mistake and inadvertence, and that it was the intention of the testator to give this legacy to the American Bible Society. The counsel for the American and Foreign Bible Society, claiming, and the claim being admitted, that there was no other corporation of this name, objected to the admission of this evidence on the ground that it was not competent for the American Bible Society to prove that this legacy was intended for it by any other evidence than the will itself. The counsel for the American and Foreign Bible Society also objected, that if any evidence was admissible to show that the American Bible Society has been known or called by any name other than its corporate name, it can only be allowed to show in this proceeding that it is as well known by the name of the American and Foreign Bible Society as by any other name, or at least as well known by said name as is the respondent, whose corporate name is the American and Foreign Bible Society.

The testator had resided in, and in the vicinity of Hartford, and had been a regular attendant upon public worship in

churches of the Congregational order, and had never been in especial sympathy with any church or society of the Baptist denomination. The American and Foreign Bible Society was incorporated in 1848 by the legislature of the state of New York for, and is engaged in the work of, circulating the Bible in all lands; it is managed by persons connected with the Baptist denomination; and in their answer they say that they were well known by their said corporate name to, and received contributions from, Congregationalists and Presbyterians residing in all parts of the state of Connecticut, long before the date of the testator's will.

The American Bible Society received their act of incorporation from the legislature of the state of New York in 1841, for, and are now carrying into effect, the like purpose of circulating the Bible at home and abroad; they have been and still are supported by churches and individuals of the Congregational order in all parts of the state of Connecticut; and the court finds that they were known by the following names and designations, viz: "The American Bible Society," "The American Bible Society for Foreign Distribution," and "The American and Foreign Bible Society;" and their offer is to prove that while the scrivener was drawing the will the testator said to him that he wished to give to the Bible society sustained by the Presbyterians and Congregationalists the sum of fifteen hundred dollars; that he was not sure as to its corporate name, but believed it to be the American and Foreign Bible Society; and that this name was used by the testator as and for the name of the American Bible Society, and that it is descriptive of the character and objects of this association and the work it was organized to perform.

It is quite certain that the testator desired to promote the circulation of the Bible; that the contesting corporations are both engaged in that work substantially in the same field; and that both were known to, and drew their support from, persons, societies and churches interested in their respective undertakings, in the places of the testator's residence. We may say of them as of individuals, that each had its residence and was known in his vicinity.

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It is to be observed that there is no offer of proof that he had ever spoken of, or had heard any person speak of, or had himself ever known either of the two societies by any other than their respective corporate names; none that he had ever in speech or writing substituted one name for the other, either by mistake or intentionally for convenience; none that the American Bible Society was or is as well or as widely known by the name of the American and Foreign Bible Society as is the society whose name by right it is.

We are of course to presume that he was in full possession of his mental faculties; the finding shows that no person misled him by making a false statement; he heard no suggestion even; his mind was upon the subject and the resultant name declared and directed by himself stands written as the "American and Foreign Bible Society."

We have then two corporations practically residing in the neighborhood of the testator, each doing that which he desired to have done, and the name of one of them is plainly written in his will as a legatee. There would seem to be here that certainty which under the rules of law defies any attempt to control or vary the language. The offer is to prove an intention not suggested by any expression or provision in the will, and not apparent when we look at the names of corporations circulating the Bible. It is a proposition to strike out a name which is perfectly descriptive.

In view of the facts found by the court and of the relation which these corporations have to each other and to the testator, admitting that he made a mistake, yet the law will not permit the court to intermeddle; it insists that what he has so plainly written shall stand as the best proof of his thoughts at the moment.

And, although one of the fundamental canons of interpretation requires courts to discover and be led by the intention of the maker of an instrument, that intention in the case of a testator is judicially determined to be simply what he has written, if his language be clear and precise and the person or thing exist and be accurately named. In *Tucker v. Seamen's Aid Society*, 7 Met., 188, it is said that "the general

rule certainly is that the intent of the testator is to govern in the construction; but it is the intention expressed by the will and not otherwise." In *Gwillim v. Gwillim*, 5 Barn. & Ad., 122, Parke, J., said that "in expounding a will the court is to ascertain, not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words he has used." In *Beaumont v. Field*, 2 Chitty's Rep., 275, Abbott, C. J., said the question was not abstractly, what was the meaning of the grantor, but what was his meaning by the words used.

The highest and best evidence is always to be sought for; and when a man deliberately puts his intention in writing under testamentary safeguards, and carefully preserves that writing for the guidance of those who represent him after his death, courts regard it as revealing his thoughts and intents with more accuracy than would any parol declarations which extrinsic evidence could substitute for it. Under any other rule that which might come at last to be accepted as the will would be not what the testator wrote, but what others have said since his death; indeed, he being silent, the rule is the sole support and defence of a will where there are disappointed heirs or legatees.

The rule of law governing this case is, that it is only where, in a will, the description of the person or thing intended is applicable with equal certainty to each of several subjects, that extrinsic evidence, including proof of the testator's declarations as to his intentions made at the time of drawing the will, is admissible for the purpose of establishing which of such persons or things was intended by him. The words of the will must be such as to render it a matter of necessity to have recourse to extrinsic evidence to explain them; if no such necessity exists, the evidence is not admissible.

Persons who desire to make testamentary disposition of their estates other than that made for them by the statute of distribution, are required to call about themselves several attesting witnesses and to speak and act in accordance with precise and solemn forms, in order to guard against the entrance of fraud, deception or mistake into their work. And

the courts supporting the statute have persistently and with a good degree of unanimity refused admission to parol evidence of the kind offered in this case, either to contradict, add to, take from, or explain, the contents of a will so clear as to the legatee as is the one before us, even when the failure of an intended disposition is the result of such refusal.

In *Avery v. Chappel*, 6 Conn., 270, the testator said in his will as follows: "And it is my will that Charles W. Chappel should have the whole of my landed property after the marriage or decease of his honored mother." Upon the re-marriage of the widow the guardian of Charles W. brought an action of ejectment against her and her husband; thereupon the latter prayed for an injunction against that action and asked for a decree quieting the petitioners in the possession and use of the real estate until Charles W. should arrive at full age. They offered proof that before, at, and after the making of the will, the testator told his wife that the use of the whole real estate would be and by his will was hers until their children should arrive at full age; that he gave directions to the scrivener so to write it as to give his wife the use of all his real estate until the children should arrive at full age; and that the scrivener wrote it as he did by mistake. In the opinion the court says (p. 276): "The proof offered by the plaintiffs was parol evidence only. Upon these facts, with our statute of wills and the solemnities required by it in view, it is certainly difficult to interpose for the relief of the plaintiffs. The court is asked to take from the devisee, the principal object of the testator's bounty, the possession of this estate for a long period, in opposition to the true construction of the will, by parol proof of the declarations of the deceased that he intended to give it to his wife; in other words, to make a will for him when he sleeps in his grave. Strong reasons should be urged in support of a claim so novel, and so forbidding. * * It was decided in the highest court in South Carolina, after much discussion and deliberation, that parol evidence, even of the person who drew the will and who was of unimpeachable character, when offered to support the allegation of a mistake in the will and that the

testator intended to dispose of the property in a manner not apparent on the face of the will, was not admissible. *Rothmaler v. Myers*, 4 Dessaus., 215. Where there is a complete and plain will in writing, it cannot be altered or influenced by parol evidence as to the intention. 2 P. Wms., 421. Evidence as to matter *dehors* the will to show the mistake is insufficient. 2 Atk., 373. Even the instructions for the will are inadmissible to show a mistake. 2 Ves. & Bea., 318; 1 Mad. Chan., 81."

In *Comstock v. Hadlyme*, 8 Conn., 254, it was admitted that the testatrix gave directions to the scrivener to insert in her will a legacy of \$100 to each of the appellants, they being her only heirs at law, and that by mistake of the scrivener the amount of the legacy was omitted, and that she signed and published the will supposing it to contain those legacies. In the course of the opinion declaring that this mistake did not invalidate the will, WILLIAMS, J., says as follows: "The statute, when it required all wills to be in writing signed by the testator and attested by witnesses, certainly intended that the evidence and the whole evidence of the disposition of property by will, should be by the will itself; that the evidence of the intent of the deviser should be derived from the writing signed by him and solemnly attested; otherwise innumerable would be the cases where evidence of mistake would be claimed and proved. * * * And if it is settled that you cannot by parol proof alter the legal import of the terms used by the scrivener, such a will must either be void or convey a different estate from the one intended. That such a will is not void, is proved by repeated declarations of judges that by the legal construction they knew that the intent of the testator was frequently violated. Doug., 763; 1 Brod. & Bing., 261, n.; Cowp., 660."

In *Mann v. Mann*, 1 Johns. Ch. Rep., 234, Chancellor Kent said: "From Cheney's case (5 Coke, 68,) down to this day, it has been a well settled rule that parol evidence cannot be admitted to supply, or contradict, enlarge or vary the words of a will, nor to explain the intention of the testator, except in two specified cases. 1st. Where there is a latent ambiguity

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arising *dehors* the will as to the person or subject meant to be described, and 2d to rebut a resulting trust."

In *Tucker v. Seaman's Aid Society*, 7 Met., 188, the legacy was to the "Seaman's Aid Society in the city of Boston." Another society denominated the "Seaman's Friend Society" claimed the legacy, and offered evidence to prove that the testator had no knowledge of the existence of the society named in the will; that he knew of the existence of the other society, was deeply interested in its objects, and contributed to its funds, and had frequently expressed a determination to give it a legacy; that he directed the scrivener who wrote his will to insert the legacy as made to said society; that the scrivener not knowing of the existence of said society, told the testator that the name of this society was the "Seaman's Aid Society;" and that the testator thereupon submitted to have that name inserted. Held, that the evidence was inadmissible and that the "Seaman's Aid Society" was entitled to the legacy.

In *Hiscocks v. Hiscocks*, 5 Mees. & Wels., 363, the devise was to the testator's son John H. for life, and on his decease to the testator's grandson John H., eldest son of the said John H., for life; and on his decease to the first son of the body of his said grandson John H. in tail male, with other remainders over. At the time of making the will the testator's son John H. had been twice married; he had by his first wife one son, Simon; by his second wife an eldest son, John, and other younger children, sons and daughters. It was held that evidence of the instructions given by the testator for his will and of his declarations after its execution was not admissible to show which of these two grandsons was intended by the description in the will.

In *Drake v. Drake*, 8 House of Lords Cases, 172, the devise was to "my sister Mary Frances Tyrwhitt Drake," and : further residuary devise to "my niece Mary Frances Tyrwhitt Drake;" at the time of his will and death the testator had neither sister nor niece bearing that name; but he had a sister-in-law who did, and she claimed the devises, and in support of that claim offered the evidence of the solicitor who

prepared the will as to the instructions which he received from the testator; and it was determined that the evidence was inadmissible.

In *Charter v. Charter*, Law Reports, English and Irish Appeals, House of Lords, Vol. 7, 364, (1874,) it was determined that evidence of the declaration of a testator as to whom he intended to benefit or supposed he had benefited, can only be received where the description of the legatee or of the thing bequeathed is equally applicable in all its parts to two persons or to two things.

Sir James Wigram's seventh proposition is as follows: "Notwithstanding the rule of law which makes a will void for uncertainty where the words aided by evidence of the material facts of the case are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose. These cases may be thus defined. Where the object of the testator's bounty, or the subject of disposition, (that is, the *person* or *thing* intended,) is described in terms which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator." Wigram on Extrinsic Evidence, sec. 184, page 160. Mr. Justice Williams says: "In a court of construction, when the factum of the instrument has been previously established in the court of probate, the inquiry is closely restricted to the contents of the instrument, in order to ascertain the intentions of the testators." Williams on Executors, Vol. 1, page 313, 5th edition.

Our attention was directed to the following cases by counsel for the American Bible Society. After a careful study of them we cannot see that they break the force of the rule stated.

In the case of *The American Bible Society v. Wetmore*, 17 Conn., 181, there was a bequest to the Foreign Missionary Society; no corporation bearing that name claimed it; but it was claimed by the American Board of Commissioners for

Foreign Missions. There being no legatee answering to the description in the will, the court below admitted evidence tending to show that at the date of the will the last named society was commonly known to the testatrix and among the members of the church to which she belonged by the name of the Foreign Missionary Society.

In *Ayres v. Weed*, 16 Conn., 291, the devise was to the *Protestant Episcopal Church in New Canaan*; there was a voluntary association which had acquired by assumption or reputation the name of the *Protestant Episcopal Society* in New Canaan. The plaintiffs claimed that the *church* was a body composed of the communicants and all baptized persons in the *society*; that it was a distinct body from the latter; that it was not known to the law and therefore that a devise to the *church* was void. There was therefore no legatee answering the exact words in the will; there was only one claimant for the legacy; and the court allowed parol proof that the terms "church" and "parish" were with respect to this denomination used indiscriminately and in the same sense as the term "society;" that the deviser himself in speaking of the affairs of the society always called it "the church;" that he had long been a member of the society and contributed to its support very liberally. In the course of the opinion the court says: "In this case it appears that there were two bodies of persons, neither of which had any name excepting by assumption or reputation; by which is meant that neither of them had any name conferred upon or attached to it by any law or charter; and that both of them were usually and indiscriminately called and known by the name used in the will to denote the devisee." And after adverting to certain arguments of counsel the court says: "But however that may be, we have no doubt that the case presents a latent ambiguity, explainable by parol evidence of the testator's intention."

In *Brewster v. McCall's Devises*, 15 Conn., 275, the bequest was to the "Missionary Society of Foreign Missions." The bequest was claimed by the American Board of Commissioners for Foreign Missions, no other society claiming it; the

heirs at law resisted the claim upon the ground that there was no such society in existence as that named in the will, and that therefore the bequest was inoperative. The court says: "It appearing from the testimony in the case that there are several societies pursuing the same object as that of the society named in this devise, and which were in existence when this will was executed, it becomes necessary to ascertain which of them was intended by the testator. That parol testimony is admissible for this purpose does not admit of a doubt. It is the case of a *latent ambiguity*, raised by the parol evidence, which discloses the fact that there are several such societies, and which therefore may be removed by the same species of evidence." The case was disposed of upon the ground that there was no society bearing the name inserted in the will; that there were several whose objects and character were correctly described by those words, considered as words of description; and that there is nothing in the will to show that the testator intended to designate any particular society by name.

In *Trustees v. Peaselee*, 15 N. Hamp., 317, the bequest was to the "Franklin Seminary of Literature and Science, Newmarket, N. H.," and there was no other school or seminary of learning or science in that town except the "South Newmarket Methodist Seminary." There being no other claimant the court admitted parol evidence of the testator's declarations made at the time of executing his will as to the intended recipient of the bequest.

These cases were determined upon the principle that where in the matter of description there is a mistake, that is, there is no corporation which corresponds to the description in all particulars, but there is one corresponding in many particulars, and no other which can be intended, such corporation will take. Where the name used does not designate with precision any corporation, but, where the circumstances come to be proved, so many of them concur to indicate that a particular one was intended, and no similar conclusive circumstances appear to distinguish and identify any other, the one thus shown to be intended will take.

In *Selwood v. Mildmay*, 3 Vesey, 306, the bequest was of a part of the testator's four per cent. annuities; at the date of the will he had no such property, having previously changed it into long annuities; the court received the evidence of the scrivener to prove that the testator as part of his instructions for the will placed in his hands a former will giving legacies from the four per cent. stock and that he being ignorant of the change of investment had made the mistake; and upon this evidence the mistake was corrected. Of this case Tindal, C. J., said in *Miller v. Travers*, 8 Bingham, 244, as follows: "This case is certainly a very strong one, but the decision appears to us to range itself under the head that *falsa demonstratio non nocet*, where enough appears upon the face of the will itself to show the intention, after the false description is rejected." And in *Wigram*, 167, it is said that the case as explained in *Miller v. Travers* may be regarded as a case decided upon a correct principle wrongly applied to the facts and which ought not to be followed *in specie*.

In *Thomas v. Thomas*, 6 T. R., 671, the devise was to "Mary Thomas of Llechlloyd, in Merthyr parish," and it was found that Mary Thomas who was described in the will as the testator's granddaughter was his great-granddaughter, and lived at Greencastle in the parish of Llangain, some miles from Merthyr parish, where she had never been in her life. The testator had a granddaughter by the name of Elinor Evans, who, at the date of the will lived at Llechlloyd, in Merthyr parish. The legacy was declared void on account of uncertainty as to the legatee; the court saying however that declarations of the testator made contemporaneously with the execution of the will as to which of the two persons was in his mind, were admissible. But in *Hiscocks v. Hiscocks* Lord Abinger said that *Thomas v. Thomas* seemed to him to be at variance with the decision in *Miller v. Travers*, which last he thought entitled to great weight.

We advise the Superior Court that the American and Foreign Bible Society is entitled to the legacy in question.

Second. The question with regard to the claim of the Hartford Hospital arises on the following facts: The testator by the ninth clause of his will gives eleven annuities, amounting in all to \$3,700, the will then proceeding as follows:

“For the purpose of paying these annuities, I devise to John C. Parsons, of Hartford, bonds of the state of Connecticut, to the amount of fifty thousand five hundred dollars, to be held by him in trust to receive the interest and income therefrom, and pay said annuities therefrom, and if such interest and income is not sufficient, the balance to be paid by my executors out of funds in their hands. If any of said bonds should be paid, the amount to be re-invested in good state or national bonds, and the said amount so placed in the hands of said Parsons as trustee, with any part of the income therefrom not required for said annuities, shall be disposed of as in the next clause provided, after and as fast as the said annuities cease.

“10. It is my will that the said amount so placed in the hands of said Parsons as trustee, after and as fast as said annuities shall cease, shall be equally divided between the Hartford Hospital Society and the Connecticut State Prison, the principal to be kept invested in good bonds or mortgages, and the interest and income therefrom to be used to pay over to persons discharged therefrom who are destitute, and are thought worthy of aid; such aid not to exceed thirty dollars to any one person in any one year, and to be given at the discretion of the steward, or person in charge, and the visiting physician of said hospital, as to those discharged therefrom; and at the discretion of the warden or person having the charge of the prison, and the chaplain, as to those discharged from the state prison. The said half of said fund so to be used for the state prison is to be paid over to the state of Connecticut in trust for the purposes named, and the principal to be kept invested as aforesaid, and the interest and income alone used as aforesaid. * * * * *

“12. I give and devise to the Hartford Orphan Asylum the westerly half, and to the Hartford Hospital Society the easterly half, of the land owned by me on the northerly side

of Hamilton Street, and extending back to an alley about one hundred and twenty feet, in ten acre lot No. 140 in the city of Cleveland."

The testator afterwards, on the 5th day of October, 1874, made a codicil of which the second clause was as follows:

"*Item:* I do hereby revoke all devises in said will beneficial to the Hartford Orphan Asylum, and to the Hartford Hospital Society, and in substitution for said devises I do hereby give and bequeath to the said Hartford Orphan Asylum the sum of five thousand dollars, payable one-half in one year and one-half in two years after my death without interest; and I do hereby give and bequeath to the said Hartford Hospital the sum of five thousand dollars, payable one-half in one year and one-half in two years from my death without interest."

The Hartford Hospital in its answer avers as follows:

"Said testator owned real estate in the state of Ohio. His will was drawn by Loren Prentiss, Esq., of Cleveland, his confidential adviser and a practicing attorney in Ohio. Contemporaneously with said draft of the will said Prentiss advised the testator that there had been statute laws of the state of Ohio avoiding devises of land in Ohio to corporations, if such devises were made within one year before the death of the testator, and that he was uncertain whether said statutes were in force; that he would advise the testator as to the statutes upon his return to Ohio, so that the gifts of land in Ohio to the corporations could be made available by substitutions of deeds or pecuniary legacies; and said Prentiss did, in August or September, 1874, advise the testator that such devises would be avoided by the testator's death within one year; and solely in consequence of said advice, the testator made his codicil to his will, substituting a pecuniary legacy by his first item to the donees of article twelve, and only as a substitute for article twelve, and at the same time made a deed of the property described in articles thirteen and fourteen to the devisees named in said articles, and in substitution for said articles thirteen and fourteen in said original will. Said codicil and said deeds were drawn under Mr. Prentiss's instructions that his gifts of land to said corporations were

liable to be avoided, and for the purpose of securing in other forms an equivalent and substituted benefit to his said devisees. And the gifts to the corporations in item first of the codicil were of substantially the same worth as the devise of the land. And any other apparent change in his gifts to the hospital than such substitution, if any there is, is a mistake, and against the intention of the testator. For these causes, and others, the respondent asks the court to decree that the revocation aforesaid in the codicil be limited to the twelfth clause of said will."

The court makes the following finding of facts upon this point:

Upon the trial the Hartford Hospital Society, in support of the allegations of their answer, offered in evidence the deposition of Loren Prentiss, Esq., a lawyer of Cleveland, Ohio, and the testimony of Mr. A. C. Dunham, that the letter of Prentiss to the testator, referred to in the deposition, had been received by him when the codicil to the will in question was made; and that the deeds referred to in the last item of the codicil were made because of the letter; also that the real estate devised by the twelfth article of the will was of the value of about \$10,000. Also the testimony of H. C. Robinson, Esq., that he drew the codicil for the testator, who then told him that by his will he had given land in Cleveland to the Hartford Hospital Society and to the Hartford Orphan Asylum; that he then inquired of the testator if that was all that he had given them, to which he replied, "Yes." The counsel for the executors objected to all this evidence, as being in its character inadmissible for the purpose for which it was offered. If the same be admissible, it is found that while the testator intended, by the first item of the codicil, to revoke any and all provision which he had made by his will for the Hartford Hospital Society, and to substitute therefor the legacy of \$5,000, given by the codicil, yet that he had not, when the codicil was made, in his recollection the bequest which he had made to them by the tenth article of his will, and his attention was directed only to the devise to them contained in the twelfth article of the will.

The deposition referred to is as follows:

"Loren Prentiss, of lawful age, residing at Cleveland, Ohio, being duly sworn, on his oath does depose and say, as follows: On the 14th day of July, 1874, I drew the will of James Root, of that date. At the time of drawing the will I informed Mr. Root that there was a statute which I believed to be still in force, in Ohio, by which it was enacted that any testamentary gift or devise, made within one year of the death of the testator, to any corporation or society, should be void, and that if he wished the bequests and devises made by him to corporations, of property in Ohio, to be certain of taking effect, it would be necessary for him to make formal conveyance of the property, and that otherwise his death within one year from that date would make void such bequests or devises of property in Ohio. The will referred to was drawn at the residence of Mr. Root in Hartford, and I was at the time somewhat pressed for time, not having expected, when I visited him, to be called upon to draw his will, and I said to Mr. Root that upon my return to Cleveland I would ascertain if the law referred to was still in force, and write him. As soon as my engagements would permit, after my return to Cleveland, I looked up the law in question, and finding it to be still in force, I wrote to Mr. Root to that effect. Of this letter I preserved no copy, but its purport was to the same effect as I have stated, and it was written not later than the month of August, 1874."

A codicil is defined to be some addition to or qualification of one's last will and testament. For certain purposes it brings the will to its own date; it is to be regarded as a part thereof; both are to be construed as one instrument, and they are alike subject to the rules of law governing the admission of parol evidence for the purpose of adding to, varying or explaining their respective contents. The authority of both rests upon the execution of a writing in accordance with statutory requirements. To subject that writing to the mercy of men's memories and motives would be to repeal the statute judicially.

By the ninth and tenth clauses of the original will the tes-

tator had bequeathed to the Hartford Hospital a reversionary interest in a portion of a legacy of \$50,500, and by the twelfth clause he had devised to the same corporation certain real estate in Ohio. In the second clause of the codicil are these words: "I do hereby revoke all devises in said will beneficial to the * * * * Hartford Hospital Society." These are plain words, all of common use and well known meaning. The paragraph is as direct, certain, and comprehensive as can be framed from our language. Nothing in itself, nor in any other clause of the will or codicil, suggests a doubt as to its meaning. The authorities and precedents hereinbefore cited defend it from the explanations of the solicitor who wrote it.

In *Guardhouse v. Blackburn*, Law Reports, 1 Prob. & Divorce Cases, 109, the head note is as follows: "Where a codicil had been read over to a capable testatrix and duly attested by her, the court refused to exclude from probate certain words inserted in it, and which were not in accordance with the instructions given by her to her solicitor, nor were contained in the draft codicil which had been read over to and approved by her, although such words were sworn by the solicitor who prepared the codicil to have been inserted without any instructions from her, and by his inadvertence." In delivering his judgment Sir J. P. Wilde said: "The codicil was proved to have been read over to the testatrix before the execution thereof, she duly executed the same, and the court conceives it to be beyond its functions or powers to substitute the oath of the attorney who prepared it, fortified by his notes of the instructions of the testatrix, for the written provisions contained in a paper so executed."

There is an offer to prove by parol testimony that the use of the expression "all devises" in the codicil was the result of a mistaken recollection on the part of the testator as to the number of devises and legacies to the Hospital contained in the original will; and it is true that the law will presume in favor of a devise or legacy that it is not annulled by a clause of revocation in a codicil if a mistake as to a fact moves the testator to write it and continue it in force, and he

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states in the writing what the fact is and therein shows that the revocation is made conditional upon its existence.

In *Campbell v. French*, 3 Ves., 321, the testator having by will bequeathed to the two grandchildren of his late sister £500 each, by a codicil declared that he revoked the legacies bequeathed by his will to such grandchildren, *assigning in his codicil as the reason for the revocation that they were all dead*; in fact they were all living after his death, and Lord Loughborough held that the legacies were not revoked.

In *Evans v. Evans*, 10 Adol. & Ellis, 228, the testatrix devised lands for life to *A*, with remainder to his first and other sons in tail, with remainder to his daughters in tail. By a codicil, *after reciting the above devise and that A had died without leaving issue*, she devised the lands to *B*. In fact *A* did leave a child whose birth was unknown to the testatrix when she made the codicil. This was held to be a conditional revocation; and the fact being contrary to what she had supposed, the devise in the will remained in force.

Upon these two cases Mr. Jarman remarks as follows: "Had the testator in the two preceding cases, instead of making the death of the devisee or legatee, under the circumstances described, the ground or reason of the revocation, founded such revocation on his advice or belief only of the fact, it is conceived that the result would have been different. A distinction of this nature seems to be warranted by the case of *Attorney-General v. Lloyd*, 3 Atk., 552, 1 Ves. Sen., 32, where a testator, having by a will made before the passing of the statute of 9 Geo. II, ch. 36, devised lands and bequeathed personalty to be laid out in lands for charitable uses, made a codicil posterior to the act, by which, after reciting that *being advised* that the devise of his lands would be void, and it being his intention that the charity should be continued, and being advised that his personal estate could be given, he did by such codicil give his personal estate to the charitable uses before mentioned, and he did thereby give his real estate to *B*. Though the testator's notion as to the invalidity of the devise in the will was erroneous, it was held that the devise to *B* took effect. So, where a testatrix by her

will bequeathed £300 among such of the children of *E* as should be living, and by a codicil proceeded as follows: 'I give to my brother's son *C* the £300 designed for *E*'s children, as I know not whether any of them are alive and if they are well provided for,' Sir R. P. Arden, M. R., held *C* to be entitled though the children of *E* were living. He observed that it was argued, and with some ground, that if it rested upon her not knowing whether they were living, there would be some reason to contend that it fell within the case (so often cited from Cicero de Oratore) of *pater credens filium suum esse mortuum, alterum instituit hæredem; filio domi redeunte hujus institutionis vis est nulla*; but the testatrix goes further, that she doubted, if they were living, whether they might not be well provided for, and she totally deprives them of that provision. The court will not inquire whether they are well provided for or not. *Attorney-General v. Ward*, 3 Ves., 327." 1 Jarman on Wills, (Perkins's Notes,) side page 166.

In *Gifford v. Dyer*, 2 R. Island, 99, it is said that if the testatrix "had made the will under a mistake as to the supposed death of her son, this could not be shown *dehors* the will. The mistake must appear on the face of the will, and it must also appear what would have been the will of the testatrix but for the mistake. Thus, where the testator revokes a legacy upon the mistaken supposition that the legatee is dead, and this appears on the face of the instrument of revocation, such revocation was held void."

Mr. Jarman states the rule thus: "And here it may be observed that where a testator, by a codicil revokes a devise or bequest in his will or in a previous codicil, expressly grounding such revocation on the assumption of a fact which turns out to be false, the revocation does not take effect; being, it is considered, conditional and dependent on a contingency which fails." 1 Jarman on Wills, (Perkins's Notes,) side page 165.

In this writing the testator has not stated the reason for his act of revocation; he has not based it upon the assumption of any fact which has turned out to be false; his completed

written work gives no clue as to what moved him to make the change; he has used only the words absolutely necessary to effect a result. But the court is asked to find from extrinsic parol evidence that one, selected from the many impressions which might have produced action, was the source and only source from which the impulse came; and that upon this impression the revoking clause held its place in the codicil to the testator's death. We think this cannot be done.

Again, the parol evidence, if received, would seem to be scarcely sufficient to justify the court in striking out the words "all devises" and inserting the words "one of the devises." It is found that when the testator sat down to write the codicil he intended to recall all devises and legacies previously made to the hospital. If therefore that instrument contained several different devises and legacies to that corporation, his all-including intention to revoke would reach each one, even if at the instant the memory failed to marshal them all before him. If there was that dominant thought that everything should be withdrawn, then the thought and the expression of it are in harmony.

It is suggested by counsel that the word "beneficial" excludes the legacy in trust to the hospital from the operation of the revoking clause, inasmuch as it is solely for the benefit of out-going patients, and that there is in the corporation simply a naked trust. But, it is quite certain that in the testator's mind any person would be benefited by being made an instrument for the distribution of his gifts. In his will he devises land to A. C. Dunham in trust, merely to hold the legal title until a charter should create a corporation capable of taking it; a trust which probably would be burdensome, certainly would be unprofitable; yet the testator speaks of this, the most barren title known to the law, as "beneficial." Throughout the will and codicil, such words as "devise," "legacy," "bequest," and "beneficial," are used as the people use them, and not with professional accuracy and meaning.

We advise the Superior Court that all devises and legacies to the Hartford Hospital, contained in the body of the will, are revoked by the codicil thereto.

Third. Concerning the legacy of three thousand dollars to the "American and Foreign Missionary" Society the petition contains the following averments:

"It appears that the testator was, during his life-time, an attendant at churches of the Congregational order, and was a contributor to the various benevolent societies sustained wholly or in part by the churches of that denomination, and was not in especial sympathy with churches or societies maintained by any other religious denominations; that there is not, as the petitioners are informed and believe, any society or incorporation named or known as the American and Foreign Missionary Society; that there is a society incorporated by the legislature of the state of Massachusetts, in the year 1812, by the name of 'The American Board of Commissioners for Foreign Missions,' which is sustained mainly by churches and individuals of the Congregational order, and to which the testator in his life-time had been accustomed to contribute; that said American Board of Commissioners for Foreign Missions claim that said legacy of three thousand dollars to the American and Foreign Missionary Society was intended for themselves, and demand that it shall be paid to them, and the question arising upon these facts is, whether the said American Board of Commissioners for Foreign Missions is legally entitled to receive said legacy, and if not, then who is entitled to receive it, or whether it shall become a part of the residuum of the estate."

To these averments the American Board of Commissioners for Foreign Missions make answer as follows:

"The said defendant admits that the said James Root was during his life-time an attendant at churches of the Congregational order, and a contributor to the various benevolent societies sustained in whole or in part by the churches of that denomination, and was not in especial sympathy with churches or societies maintained by any other religious denomination; that there is no society or corporation known by the name of the American and Foreign Missionary Society; that the defendants were incorporated by the legislature of Massachusetts in the year 1812, by the name of the American Board

of Commissioners for Foreign Missions; and they claim that said bequest of three thousand dollars in said will to the American and Foreign Missionary Society was intended by the testator to be a devise to these defendants, and for this claim they here assign the following reasons, to wit:

"1st. The American Board of Commissioners for Foreign Missions was established and incorporated 'for the purpose of propagating the gospel in heathen lands,' and has expended and is expending large sums of money annually in sustaining missions in foreign countries, and is sustained by persons belonging to the sect of Christians called Congregationalists.

"2d. The said James Root in his life-time was for many years a resident of the town of East Hartford, in said Hartford County, and a member of the Congregational society in that town; that contributions to the funds of the defendant were annually called for from the members of said Congregational society, and Mr. Root was a cheerful and liberal patron of those contributions.

"3d. There is no other society or corporation connected with the Congregational order in Connecticut that has for its object the support of missionaries in foreign lands.

"4th. The defendant corporation in the vicinity in which Mr. Root lived and died was known as the Foreign Missionary Society, to distinguish it from the Home or Domestic Missionary Society.

"5th. The term 'American and Foreign Missionary Society,' used by the testator, designates the purposes and objects of the defendant corporation, inasmuch as it is an American corporation for the purpose of supporting missionaries in foreign lands."

The court found the allegations of the answer to be true.

There is a clearly expressed intention on the part of the testator to make a contribution from his estate to the cause of missions in foreign lands. The court finds that no corporation or society is known by the name of the "American and Foreign Missionary Society;" that the "American Board of Commissioners for Foreign Missions" is a society incorporated

for and engaged in the work of foreign missions; that it is supported by persons belonging to the Congregational order; that it received annual contributions from the Congregational society of which the testator was a member; that he was a cheerful and liberal contributor to its funds; that there is no other society or corporation connected with the Congregational order in Connecticut sending missionaries abroad; and that it was known in the vicinity where he lived and died, by the name used in the will.

Inasmuch as no other society claims the legacy, the case upon this finding falls within the principle to which we have already referred and which we here re-state, namely, that where the name used does not designate with precision any corporation, but, when the circumstances come to be proved, so many of them concur to indicate that a particular one was intended, and no similar conclusive circumstances appear to distinguish and identify any other, the one thus shown to be intended will take. *Brewster v. McCall's Devisees*, 15 Conn., 274.

We advise the Superior Court that the "American Board of Commissioners for Foreign Missions" is entitled to the legacy given to the "American and Foreign Missionary Society" in the eleventh section of the will.

Fourth. Concerning the legacy to James P. Averill the petition contains the following averments:

The seventh section of the will is as follows: "I give and devise to my brother Samuel's three sons, Buel, Judson, and Charles M.; the four sons of Henry P. Averill of Perrysburgh, Ohio, James, Henry, Elisha, and the other son whose name I do not certainly remember, but think it is Elijah; and the two sons of Mary Allen (granddaughter of my sister Mary) and their heirs—to each of said nine nephews, three thousand dollars; and to said Charles M. I give an additional one thousand dollars." And the petitioners found, after the death of the testator, among sundry promissory notes payable to him, a receipt in the handwriting of the testator, and

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signed by James P. Averill, son of Henry P. Averill, above named, which was as follows: "Oct. 1, 1872. Received of James Root, Hartford, Connecticut, Three Thousand Dollars, in anticipation and discharge of any legacy bequeathed to me by said Root by his will of prior date. JAMES P. AVERILL;" which receipt bears the following endorsement or filing in the hand-writing of the testator, namely, "Rect. & note, James P. Averill, Perrysburgh, Ohio, Oct. 1, 1872." And it is admitted that the sum of three thousand dollars was at the date of the receipt paid by the testator to said James P. Averill; and the question arising upon these facts is, whether such payment constitutes an advancement or charge against the said James P. Averill which will bar or offset said legacy.

No such relation is shown to have existed between the legatee and the testator as will admit of the application of the law concerning advancements; these being the giving by anticipation the whole or part of what it is supposed children will be entitled to on the death of their parents. The receipt, if admitted, in terms refers to what had been done in the past and not at all to what may be done in the future; it furnishes indisputable evidence that both parties to it regarded the sum named therein as a gift, not a loan to be repaid. But, beyond this, the language of the will is clear and precise, both in respect to the legatee and the legacy; no expression in it, no fact existing outside of it, throws the shadow of a doubt upon the identity of either; we can discover no door for the admission of the extrinsic evidence; the testator, having in memory all that had previously passed, chose at last to insert the name of James P. Averill in his re-drafted will. Therefore, as it is not found that there is any indebtedness on the part of the legatee to the testator, we advise the Superior Court that it is the duty of the executors to pay this legacy.

In this opinion the other judges concurred.

ALLYN M. COLEGROVE vs. CHARLES L. SNOW AND ANOTHER.

The plaintiff, being interested as a large bondholder in the early completion of a railroad, procured a quantity of timber for its bridges, specially prepared for that purpose, to have it ready when wanted. The timber was his own private property and he was under no obligation to furnish it for the road. A firm who subsequently contracted with the railroad company to complete the road and supply all the materials required, applied to him for the timber to use in the construction of the bridges, and he told them that they might have it. No terms were agreed upon and there was no express agreement that it should be used in constructing the bridges, but it was so understood on both sides. The plaintiff delivered the timber to the firm, who were transporting it to the place where it was to be used when it was attached by creditors of the railroad company. Held that the transaction amounted to a sale to the firm, and that the plaintiff could not maintain replevin for the recovery of possession of it from the parties attaching it.

REPLEVIN for a quantity of timber; brought to the Superior Court in Middlesex County. Facts found by a committee and the case reserved for advice. The case is fully stated in the opinion.

R. G. Pike and S. E. Baldwin, for the plaintiff.

D. Chadwick and C. E. Perkins, for the defendants.

GRANGER, J. In March, 1873, the property described in the declaration, consisting of a certain quantity of railroad bridge timber, was attached by the defendants, as the property of the New Haven, Middletown and Willimantic Railroad Company, and the plaintiff has brought an action of replevin therefor. The committee to whom the case was referred finds that the property did not belong to the railroad company, but that it was the property of the plaintiff, unless in law he lost his title by reason of the following facts.

The plaintiff bought the timber in question for the purpose of being used in the construction of the New Haven, Middletown and Willimantic railroad. It was specially cut or sawed for the viaduct bridges or trestle-work. Subsequently a contract was entered into between the railroad company and a firm by the name of Richardson & Co., to complete the construction of the railroad, the firm providing all the material.

Afterwards and about two weeks before the attachment of the timber, White, a partner of Richardson & Co., told the plaintiff that he wanted this timber to use in the construction of the viaduct bridges, and he told him he might have it; and thereupon it was placed by the track of the railroad so that it could be taken on the cars and removed to the place where it was wanted. A part of it was carried to the viaduct by White, and while the remainder was being taken by him upon the cars it was attached by the defendants.

It was understood between the plaintiff and White that White was to take the timber, and use it for the benefit of Richardson & Co. in building the road, under their contract, but there was no express agreement to this effect, and no agreement or understanding as to the terms upon which the timber was to be taken by them. At the time the plaintiff bought the timber the railroad company was insolvent and without means. He was the owner of a large amount of first mortgage bonds of the company, and was anxious to have the road completed at an early day. He bought the timber and held it to avoid the delay which would attend the working out of new timber, but was under no legal obligation to let it go into the road. When the plaintiff talked with White about the latter's having the timber, it was piled up some distance from the road, and the plaintiff afterwards, by his own agents and at his own expense, carted it to the road. From that time until it was attached by the defendants the plaintiff did nothing more about it.

Upon these facts the question is, in whom was the legal title or right of immediate possession of the property at the time it was attached? The committee finds as a fact that it did not belong to the railroad company. It must then have been the property either of the plaintiff or of Richardson & Co. The plaintiff claims that the timber was his, that he had a general or special property in it, with a right to its immediate possession. The burden of sustaining this claim rests upon him. Do the facts disclosed sustain his claim? A majority of the court think that they do not, but that they show quite clearly that the plaintiff had parted with his title

to the timber, and that he had no general or special property in it, and no right of immediate or any other possession at the time of the attachment.

It is apparent that the facts show, either a sale, a loan, or a gift. No claim is made by the plaintiff that it was the last; in fact if that claim was sustained it would be fatal to his right of recovery. But the plaintiff's claim is that the facts show a mere license to Richardson & Co. to take the timber, and that it was revocable at his pleasure, and that he had a right to seize the timber in whosoever hands he found it. This claim is altogether too broad, and is not warranted by the facts, and clearly does not accord with the intention of the parties as declared by the finding. The timber was prepared for a particular use, namely, the construction of viaduct bridges. It was purchased by the plaintiff for that very use, and it was for that use that White wanted the timber, and for that use that the plaintiff told him he might have it. For the same use and purpose the timber was put into the possession of Richardson & Co., who had made a contract with the railroad company to complete the road, and to provide all the materials. There was no stipulation between the parties that the timber was to remain the property of the plaintiff until it was paid for, and he permitted White on behalf of Richardson & Co. to take unqualified possession of the timber, and to use it as the property of Richardson & Co.; and if they had actually used the timber in the construction of viaduct bridges it could not with any propriety be claimed that the plaintiff would have any right to retake the timber, for it then would have become a part of the roadbed, and of course would have been the property of the railroad company. Nor was there any condition attached to the transaction that the timber was to remain the property of the plaintiff until it should be used in the construction of the viaduct bridges, or that he should have any right to re-possess himself of it unless it was so used. The purpose for which the property was obtained precludes the idea that it was a loan or any species of bailment, and the finding shows all the elements essential to a sale. There was a request on the part of Richardson & Co. for the

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timber, there was assent on the part of the plaintiff to the request, and the timber was delivered by him, and accepted by them, and it is of no moment that the price was not agreed upon or time of payment fixed. The law under these circumstances would impose upon Richardson & Co. the obligation to pay what the timber was reasonably worth, and allow a reasonable time for the purpose.

We advise judgment for the defendants.

In this opinion PARK, C. J., and PARDEE, J., concurred; CARPENTER, J., dissented. LOOMIS, J., did not sit.

CARPENTER, J. I cannot concur. I think there was no sale; neither party intended the transaction as a sale. The plaintiff owned the property; he had a large pecuniary interest in the completion of the railroad; it was competent for him to allow his own property to be used in the construction of the road; and I think he might well retain the title in himself until the property was actually incorporated in the railroad structure. The contractors for finishing the road had no title in fact; and whatever rights they may have had in the property, I think it is very clear that these defendants cannot avail themselves of those rights as a defense. The plaintiff's title must be good as against the defendants, who are mere trespassers.

 Camp v. Stevens.

SUPREME COURT OF ERRORS.

LITCHFIELD COUNTY.

MAY TERM, 1877.

Present,

PARK, C. J., CARPENTER, PARDEE, AND GRANGER, JS.

ABEL CAMP, ADMINISTRATOR, *vs.* NATHANIEL B. STEVENS.

Where a declaration in assumpsit set up in different counts separate demands, each of which was below the jurisdiction of the court, it was held that the court had no jurisdiction, although the different demands in the aggregate were of sufficient amount, and although the damages claimed were within the jurisdiction.

After judgment had been rendered for the plaintiff in the case, the defendant at the same term of the court moved that the case be stricken from the docket for want of jurisdiction. Held that the motion was not too late, and that the case might properly be stricken from the docket.

ASSUMPSIT, brought by the plaintiff as administrator of one Mary Humphrey, to the Superior Court for Litchfield County. The declaration was as follows:

“Then and there to answer unto Abel Camp, of Norfolk, in said Litchfield County, as he is the administrator on the estate of Mary Humphrey, late of said Norfolk, deceased, in a plea of the case, whereupon the plaintiff declares and says that the defendant, in and by a certain writing or note under his hand, by him well executed, dated the 7th day of April, 1855, promised to pay to the said Mary Humphrey, then in full life but since deceased, for value received, the sum of one hundred dollars, on the first day of July, 1858, with annual interest, as by the said writing or note, ready in court to be shown, appears. And the plaintiff further says, that the defendant in and by a certain other writing or note, under his hand by him well executed, dated the 7th day of April, 1855, promised

to pay to the said Mary Humphrey, then in full life but since deceased, for value received, the sum of seventy-six dollars and twenty-four cents, on the first day of July, 1859, with annual interest, as by the said last mentioned writing or note, ready in court to be shown, appears. And also in the further sum of four hundred dollars, for so much money found to be due from the defendant to the plaintiff upon an account then and there stated between them; and also in the further sum of four hundred dollars, for work and labor done and performed by the plaintiff for the defendant at the special instance and request of the defendant;" concluding with a demand for five hundred and fifty dollars damages. The cause was referred to a committee, who found that the defendant owed the plaintiff \$98.52. The report having been accepted and judgment rendered for the plaintiff, the defendant moved that the case be erased from the docket, on the ground that it appeared from the plaintiff's declaration that he was a resident of Norfolk in Litchfield County, and that the two notes described in the declaration, being together less than five hundred dollars, the cause was within the sole jurisdiction of the District Court for Litchfield County.

The court having overruled this motion, the defendant brought the record before this court by a motion in error.

H. P. Lawrence and *F. D. Fyler*, in support of the motion.

1. The cause had not by the acceptance of the report and judgment thereon passed beyond the jurisdiction of the court; for a judgment is amendable in form or substance during the term in which it is given. 1 Swift Dig., 785; *Weed v. Weed*, 25 Conn., 337; *Wilkie v. Hall*, 15 id., 37.

2. Upon the face of the declaration it appears that the court had not jurisdiction of the cause. The claims of the plaintiff are two promissory notes, one for \$100, and one for \$76.24; and could not, even if no payment had ever been made, exceed \$500. To bring the cause within the jurisdiction of the Superior Court it must exceed \$500, because the plaintiff was a resident of the town of Norfolk and within the jurisdiction of the District Court of Litchfield County. Gen.

Statutes, p. 37, sec. 1; p. 413, sec. 2; p. 414, sec. 7. Small claims in several counts, neither of which alone is sufficient to confer jurisdiction, cannot be joined to confer jurisdiction. *Dennison v. Dennison*, 16 Conn., 38; *Nichols v. Hastings*, 35 id., 548.

3. The *ad damnum* in the declaration is sufficient, but that cannot confer jurisdiction when the matter in demand is too small. *Lockwood v. Knapp*, 4 Conn., 258. The demand stated in the declaration governs the *ad damnum* if less than the jurisdiction, and the cause will be dismissed when the want of jurisdiction appears. *Wildman v. Rider*, 23 Conn., 176; *Hoey v. Hoey*, 36 id., 386; *Grether v. Klock*, 39 id., 133; *Hunt v. Rockwell*, 41 id., 54.

4. A cause will be dismissed in any stage, if want of jurisdiction appears upon the face of the record. *Lockwood v. Knapp*, 4 Conn., 258; *Perkins v. Perkins*, 7 id., 565; *Coit v. Haven*, 30 id., 190; *Martin v. Commonwealth*, 1 Mass., 347; *Lawrence v. Smith*, 5 id., 362.

5. The forms of the general counts, to wit, for money due upon account stated, and for work and labor done, are filled; but they allege no indebtedness to the plaintiff as administrator. They are incomplete and are only surplusage. If indebtedness was expressed it would be to the plaintiff as an individual, and not as administrator, and a plaintiff cannot join in one action demands due to himself, and also as administrator or executor. 2 Swift Dig., 202; *Johnson v. Connecticut Bank*, 21 Conn., 154.

C. B. Andrews, contra.

1. The plaintiff in error moved to erase this case from the docket after it had gone into judgment. The court below over-ruled the motion. Was this error? Clearly not. A judgment cannot be affected by a motion to erase. *Clapp v. City of Hartford*, 35 Conn., 220.

2. As this was the only question made in the court below, nothing else can be assigned for error. Rules of Practice, 37 Conn., 619; 18 id., 572; 20 id., 331; 25 id., 432; 32 id., 108; 34 id., 181; 40 id., 544.

PARK, C. J. It does not expressly appear on the record, what answer the plaintiff made to the motion of the defendant to erase the cause from the docket. But it does appear that the court overruled the motion, which must have been done on the ground, either that it was insufficient in the law, or that it came too late to be entertained after the cause had been tried on its merits and gone into judgment. If the latter ground was the basis of the ruling, the entry upon the record ought to have been that the court refused to entertain the motion on the ground that it came too late. We think that this must have been the ground of the ruling, notwithstanding the imperfection of the record, and as such we will consider it. Obviously, the Superior Court had no jurisdiction of the case if the allegations of the motion are true, and they must be taken as true, for there is no finding to the contrary, and the court, in overruling the motion, must have proceeded on the ground that they were true. Indeed, there is no count in the declaration of sufficient amount to confer jurisdiction upon the Superior Court in cases where the parties reside within the jurisdiction of another court, as they did in this case. *Dennison v. Dennison*, 16 Conn., 34; *Nichols v. Hastings*, 35 Conn., 546; *Hoey v. Hoey*, 36 Conn., 386. Furthermore, the general counts allege no indebtedness to the deceased in her lifetime, nor to the plaintiff as administrator, and therefore can bring no help to the special counts which are for an indebtedness to the plaintiff as administrator.

It follows, therefore, that no court but the District Court for Litchfield County or the Court of Common Pleas for the county of Hartford, had jurisdiction of the subject-matter of this controversy; and this appears upon the face of the declaration. It is manifest, therefore, that a writ of error would lie to reverse the judgment, if no motion had been made to erase the cause from the docket. But a motion in error takes the place of a writ of error, and will lie wherever a writ of error will lie. If then the judgment could not stand the test of a writ of error, surely it cannot stand the test of this motion in error. Why then should not the judgment be reversed? It is clearly a nullity, and when the

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attention of the court was called to the fact, we think it should have been so treated, and the cause stricken from the docket, the judgment having been rendered during the same term of the court at which the motion to erase the cause from the docket was made.

There is manifest error in the judgment complained of.

In this opinion PARDEE and GRANGER, Js., concurred.

CARPENTER, J., (dissenting). It seems to me that the only question which properly arises upon this record is whether the court erred in refusing to erase the case from the docket upon a motion filed after final judgment had been rendered. Motions to erase should, as I regard the law, be made before judgment. This was made after judgment, and I think it was therefore properly overruled. The attempt to bring up any error in the record of the judgment in this way seems to me to be irregular, and a practice not to be sanctioned by this court. The court should have first opened the judgment, which it had full power to do, having been rendered at the same term, but it was not asked to do this. The defendant's remedy, as the case stood, was I think by writ of error or motion in error, and not by a motion to erase.

But if the present motion in error is to be regarded as reaching back of the motion to erase, and as presenting regularly for our consideration the other errors assigned, then I agree with the majority of the court that the judgment was erroneous.

HEZEKIAH DRAKE vs. THOMAS STARKS, EXECUTOR.

H in 1854 being embarrassed entrusted certain property to *N*, to be sold, and after the payment of certain debts the surplus to be returned to him. In 1862 the last portion of the property was sold to one *B* and his note payable to *N* taken in payment. In 1868 *H* and *N* executed the following mutual release under seal:—"The undersigned having had mutual dealings in former days

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have reviewed the same, and though there is justly due a balance from *H* to *N*, yet, in consideration of love and affection and of one dollar, we each release to the other all obligations and demands whatsoever." At this time there remained unpaid the sum of six hundred dollars on the note of *B*, which was afterwards received by *N*. In assumpsit brought by *H* against *N*'s executor for the recovery of the money, it was held that proof was not admissible, that, at the time the release was given, *N* told *H* that the money remaining unpaid on *B*'s note should not be included in the release.

Also that evidence was not admissible that *N*, after the release and after receiving the six hundred dollars, had admitted that the money belonged to *H*.

ASSUMPSIT for money received by the defendant's intestate to the use of the plaintiff; brought to the Superior Court for Litchfield County, and tried to the jury on the general issue before *Sanford, J.* The jury having returned a verdict for the plaintiff, the defendant moved for a new trial. The facts are fully stated in the opinion.

C. B. Andrews and *F. D. Fyler*, in support of the motion, cited 1 Greenl. Ev., §§ 275, 276, 277; *Stackpole v. Arnold*, 11 Mass., 30, 31; *Carter v. Bellamy*, Kirby, 291; *Herd v. Bissel*, 1 Root, 260; *Bull v. Talcot*, 2 id., 120; *Avery v. Chappel*, 6 Conn., 270; *Crocker v. Higgins*, 7 id., 349; *Reading v. Weston*, 8 id., 118; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 29 id., 374.

H. B. Graves, contra, cited *Allen v. Frisbee*, 2 Root, 76; *Collins v. Tillou*, 26 Conn., 368; *Clarke v. Tappin*, 32 id., 56.

CARPENTER, J. This is an action of general assumpsit. The plaintiff claimed that in the year 1854, he, being in embarrassed circumstances, placed in the hands of Noah Drake, the defendant's intestate, certain property to be by him sold, the avails of which were to be applied to the payment of the plaintiff's debts, and the surplus was to be returned to him. The last of the property was sold in 1862 to one Worthy P. Bray, and a note secured by mortgage was taken for the purchase money. That note was payable in instalments, the last falling due April 1st, 1870. Payments were made from time to time, and the note was fully paid

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about the time the last instalment fell due. In November, 1868, the plaintiff and Noah Drake executed an instrument under seal as follows: "The undersigned, Noah Drake and Hezekiah Drake, having had mutual dealings and transactions in former days, have reviewed the same, and though we find that, justly, there is a balance due from said Hezekiah to said Noah, yet in consideration of love and affection, and of one dollar, we each release to the other all obligations, claims and demands whatsoever. Dated at Torrington, November, 1868.

Noah Drake. (Seal.)

Hezekiah Drake. (Seal.)"

The plaintiff offered himself as a witness and testified, subject to the objection of the defendant, that in November, 1868, at and before the time of the execution of the release, the said Noah told him that \$600 included in the Bray note belonged to him, the plaintiff, which he should pay to the plaintiff as soon as it was received from Bray; that provided Bray paid it said sum of \$600 would be coming to the plaintiff; that said Noah asked him to execute the release to show that all former matters had been settled between them, saying that it would make no difference with the plaintiff in relation to his share in the Bray note, and that he should pay it all the same just as soon as he received the money from Bray. The plaintiff further claimed to have proved by the statements and admissions of the said Noah, some of which were made prior to November, 1868, and some were made after April 1st, 1870, that said sum of \$600 belonged to the plaintiff.

There was no evidence of any other unsettled matters between the plaintiff and Noah Drake, and none was offered or claimed by either party.

The defendant offered the release in evidence, and asked the court to instruct the jury to lay out of their consideration so much of the plaintiff's testimony as tended to vary or contradict it. The court charged the jury that the release was a bar to any then existing demand, but was not a bar to any future contingent liability that might have arisen between the parties; and that if the jury should find the facts as claimed by the plaintiff, and that Noah Drake after April 1st, 1870,

acknowledged that the above sum belonged to the plaintiff, and promised to pay the same, then the release would not be a bar, but that the plaintiff might recover that sum with interest; and that in determining whether the plaintiff's claim was just, they might take into consideration all the testimony offered by the plaintiff, including his own, not for the purpose of varying or contradicting the release, but for the purpose of showing that the release did not in its terms and in fact include the future liability of Noah Drake depending upon the future contingency of the payment of the note by Bray.

Conceding that the facts were as the plaintiff claimed them to be, the question whether his demand was barred by the release was a question of law. The court instructed the jury that it was not. We think that instruction was erroneous. If the demand existed when the release was given it was barred; if it did not, but originated then, or subsequently, it was not. The claim did not come into existence by reason of anything that took place between the parties at the giving of the release. That had reference solely to "mutual dealings and transactions in former days." There was no exchange of property then, no contract between the parties, and no dealings from which an obligation could arise. The promise to pay six hundred dollars when the Bray note should be paid, was simply a promise to pay a pre-existing obligation upon the happening of a future event. This is evident from the plaintiff's own testimony, in which he says "that said Noah asked him to execute said release to show that all former matters had been settled between them, saying that it would make no difference with the plaintiff in relation to his share in the Bray note and that he should pay it all the same, &c."

That promise was manifestly designed, not to create a new liability, but to save an existing liability from the operation of the discharge.

Nor did the claim subsequently arise. No consideration subsequently moved from the plaintiff—no contract between the parties, and no business transaction out of which a liability could arise. There was simply a naked promise, the only consideration of which was the "mutual dealings and trans-

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actions in former days" between the parties. The promise did not create the liability although it might be evidence of it and did in fact name a time of payment.

The payment of the note by Bray to Noah Drake may have so far changed the relations of the parties as to give the plaintiff another remedy—an action for money had and received—but it created no new liability. The plaintiff in such action can only recover by proving the dealings between the parties as far back as 1862, and showing that out of those dealings an obligation arose, that is, that Noah Drake was liable to account to the plaintiff for the property received and sold by him. Noah Drake's liability therefore existed from 1862 until November, 1868. As early as January, 1862, he had received and sold the plaintiff's property. He had paid all demands against the plaintiff, and there was in his hands a surplus of six hundred dollars, to which the plaintiff, as he now contends, had a just claim. He certainly had it then if he has it now, and might at any time have compelled Noah Drake to account. He was not bound by the long credit given to Bray, as it does not appear that there was any provision authorizing Noah Drake to sell on credit. But however this may be, Noah Drake took the note payable to himself, not as agent or trustee, but in his individual capacity, although six hundred dollars out of seven hundred and fifty, the face of the note, belonged to the plaintiff. There would seem to be no doubt or uncertainty about the payment of the note. It was well secured by a mortgage and Noah Drake did not hesitate to assume the risk. There were several payments, quite an amount in the aggregate, made on the note before the release was given, and more than three-quarters of the amount so paid, upon the plaintiff's theory, belonged to him. Moreover the very promises on which the plaintiff relies were made at different times, and some of them before the date of the release. All these promises were made in consideration of a present liability, and contemplated a payment in the future of a then existing indebtedness.

The release in terms discharges "all obligations, claims and demands whatsoever." Inasmuch as this demand then

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existed, the release discharged it; and, as it is an essential part of the plaintiff's case, we think he is not entitled to a judgment.

A new trial is advised.

In this opinion the other judges concurred.

45	101
61	48

ISAAC SANFORD, TRUSTEE, *vs.* ANDREW B. FRENCH AND
OTHERS.

The act of 1875 (Session Laws, 1875, p. 31,) provides that "in all suits where a cause of action shall be sustained in favor of or against only a part of the parties thereto, judgment may be rendered in favor of or against such parties only; but any defendant against whom no recovery shall be obtained shall be entitled to costs." Held that where there were several defendants thus entitled to costs there could be but one bill of costs allowed.

TRESPASS *qu. cl. fr.*, brought to the Superior Court in Litchfield County. There were nine defendants, and judgment was rendered against five of them and in favor of the other four. These four claimed each a bill of costs, which claim was allowed by the court, upon which the plaintiff brought the case before this court by a motion in error. The facts are fully stated in the opinion.

W. Cothren, with whom was *C. B. Andrews*, for the plaintiff.

E. W. Seymour, for the defendants.

GRANGER, J. This is an action of trespass, brought by the plaintiff as trustee of his wife against several defendants for an injury to the dwelling-house and other real estate belonging to her. Judgment was rendered in the Superior Court in favor of the plaintiff, to recover of the defendants Andrew B. French, Edwin A. Craw, John French, Roger O. Donnell, and George Atwood, the sum of fifty dollars damages, and

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his costs; and in favor of the other defendants, Bennett French, Albert Frost, Walter H. Atwood, and Alanson Craw, and for them to recover of the plaintiff their costs.

The formal judgment rendered by the court was as follows: "Whereupon it is considered and adjudged by this court that the plaintiff as such trustee shall recover of the defendants A. B. French, E. A. Craw, John French, R. O. Donnell, and G. Atwood, the sum of fifty dollars damages, and costs of suit, allowed to be the sum of seventy-six dollars and twenty-six cents, and that execution issue therefor accordingly; and that the defendants B. French, A. Frost, W. H. Atwood and A. Craw, recover of the plaintiff their costs taxed at \$, and that execution issue therefor accordingly." The cause was continued to the April term of the court, 1877, when the last named defendants appeared by their counsel, and moved for a separate bill of costs in favor of each of them, which motion was allowed by the court, and the plaintiff thereupon filed his motion in error.

The principal question raised upon the record is, whether the Superior Court erred in allowing the four defendants separate bills of cost. The determination of the question depends upon the construction of the act of 1875, which is as follows: "In all suits where a cause of action shall be sustained in favor of or against only a part of the parties thereto, judgment may be rendered in favor of or against such parties only; but any defendant against whom no recovery shall be obtained shall be entitled to costs." The defendants contend that under this statute each defendant is entitled to a bill of costs. We think this claim can not be sustained. It was evidently not the intention of the legislature, where there were numerous defendants, as must often happen, that each one who was not found liable should be entitled to a bill of costs. The language used does not admit of any such construction, at least that is not the fair and reasonable, natural and common-sense construction of the language. "*Any* defendant" does not ordinarily, if ever, mean "each defendant," and had the legislature intended that each defendant should be entitled to a bill of costs, it is

but reasonable to conclude that they would have used apt language to express such intention, and instead of saying "any defendant" would have said "each defendant."

The construction contended for by the defendants cannot be maintained, and there was manifest error in the judgment of the court in allowing four separate bills of costs.

In this opinion the other judges concurred.

THOMAS PETERS vs. DANIEL S. STEWART.

45	108
63	456
45	108
66	560

A receiptor of goods attached, who by his receipt has bound himself to return the property to the officer upon request or pay damages, is not a mere naked bailee of the goods; but has a special property in them, and can maintain replevin against a person unlawfully detaining them from him.

Where goods were attached in the state of Massachusetts, and there delivered by the officer to a receiptor, who left them in the hands of the debtor, by whom they were brought to this state and sold—it was held,

1. That the law of this state governed upon the question whether the receiptor could maintain replevin for the goods.
2. That the receiptor was clearly entitled to the immediate possession of the goods as against the debtor, and that this alone would have been enough, under the statute in force when the suit was brought, to sustain the action of replevin.
3. That the purchaser of the goods, if he bought them in good faith of the debtor, could hold them against the receiptor.
4. That the burden of proof was on the purchaser to show that he bought them in good faith.

REPLEVIN for a horse, wagon and harness, claimed to be unlawfully detained by the defendant; brought to the District Court in Litchfield County, and tried to the court, upon the general issue, before *Foster, J.*

Upon the trial the plaintiff claimed a special property in the articles in question by reason of their delivery to him as attached property by an officer in the state of Massachusetts, where they were attached, and of the following receipt given by him to the officer:

"Berkshire ss., January 8, 1874.

"Whereas Wm. W. Langdon, Deputy Sheriff, has this day at my request delivered into my possession the following

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property, viz: one brown horse and one buggy wagon and one single harness, all of the value of fifty-one dollars or more, attached by him as the property of Daniel Stewart, on a writ in favor of Peter Blow, returnable January 17, 1874, at the District Court of Southern Berkshire, holden at Great Barrington, in said county: In consideration thereof I promise safely to keep said property until the said Langdon or his order shall call for the same, then to deliver it to him, or his order, free from any charge, at such time and place as he shall appoint, in like good order that the same now is in. And I do further promise that I will save and keep harmless the said Langdon from all costs, trouble and expense that shall or may arise to him through any default in consequence of his entrusting said property in my hands.

THOMAS PETERS.'

The plaintiff never had any possession of the property under the receipt or otherwise, but it remained in the sole possession of the defendant after the receipt in the same manner as before. The receipt was given by the plaintiff at the request of the defendant.

On the 28th day of February, 1874, the defendant, without the knowledge of the plaintiff, brought the property to Cornwall, in this state, where he disposed of it to one Daniel S. Adams, in whose possession it was found when replevied by the plaintiff in this writ.

The plaintiff, after he had replevied the property, returned it to the officer in Massachusetts who had attached it, and it was sold upon an execution recovered against the defendant.

The defendant did not appear in person to make defence in the case, but Adams, who claimed to own the property, and from whose possession it was taken under the plaintiff's writ, appeared and made defence in the name of the defendant, and the defendant appeared by his attorney.

Upon these facts the plaintiff claimed, and asked the court to decide, that he could maintain his action of replevin. The court did not so decide, but held that the plaintiff was not entitled to maintain the action, and rendered judgment for the defendant for a return of the property, and that he recover his cost. The plaintiff moved for a new trial.

J. B. Hardenburgh and *C. B. Andrews*, in support of the motion.

By the law of Massachusetts the receptor of property taken on attachment is entitled to the possession thereof, and may at any time retake the same from the debtor. Story on Bailments, (7th ed.,) § 133, and note; *Bond v. Padelford*, 13 Mass., 394; Drake on Attachments, § 367. Having the right to the immediate possession of the property, the plaintiff when he came into the state of Connecticut could enforce that right by any process known to our laws. Replevin in Connecticut is a statute remedy, which any party may have who is entitled to the immediate possession of property. *Watson v. Watson*, 9 Conn., 140, and 10 id., 76; *Ladd v. Prentice*, 14 id., 113; *Brown v. Chicopee Falls Co.*, 16 id., 90. The plaintiff if entitled to the possession of property situated in Connecticut might avail himself of any remedy existing in Connecticut. The remedy is governed by the law of the *forum*. *Wood v. Watkinson*, 17 Conn., 500; 2 Parsons on Cont., (5th ed.,) 588, and cases cited. The law of the forum gave a remedy by action of replevin "whenever any goods should be unlawfully detained except by attachment, from the owner or other person entitled to the possession." Revision of 1866, p. 75. The carrying off of the goods by the defendant out of the state where they had been attached, without the knowledge or consent of the plaintiff, was an unlawful conversion of them, and a fraud upon the plaintiff, and especially is this so if he disposed of them to a third party. The plaintiff was clearly entitled to the possession of the property, even though the defendant had disposed of it to Adams. If Adams can make defence in the name of Stewart, he has no greater rights than Stewart himself would have. He must be bound by whatever would bind Stewart. He must be presumed to have all the knowledge that Stewart had. A sale of this property by Stewart would be fraudulent. Adams must be presumed to know of this fraud. He can take no advantage of it that Stewart could not have taken. It would be a reproach upon the law to permit Stewart to come into court and set up his own fraud to gain an advantage. Under the circumstances

it would be equally a reproach to permit Adams an advantage from such sale.

H. B. Graves and *A. D. Warner*, contra.

1. A receptor to an officer, or any other bailee, for safe keeping merely, has not sufficient interest to maintain replevin. *Waterman v. Robinson*, 5 Mass., 303; *Warren v. Leland*, 9 id., 265; *Perley v. Foster*, id., 112; *Simpson v. McFarland*, 18 Pick., 427. The plaintiff must have had a right to the possession of the property at the taking or detention. *Gates v. Gates*, 15 Mass., 310; *Wheeler v. Train*, 3 Pick., 255; *Collins v. Evans*, 15 id., 63. This is the law of Massachusetts, where both parties resided, and where the taking and detention, if any, occurred.

2. But there was no taking or detention by the defendant. The plaintiff never had possession of the property, or the right to the possession. He was merely a naked receptor for the property to the officer, and permitted the property to remain in the possession of the defendant without any change. The plaintiff had become security to the officer that the property should be forthcoming to answer an execution or in default to pay the judgment debt. But at the time the plaintiff commenced his action no liability had attached to him—the officer had not demanded the property—the suit on which the property was attached had not gone into judgment. The plaintiff therefore was a mere naked receptor without any fixed liability at the commencement of his action. Under our statute, to sustain the action of replevin the plaintiff must have a general or special property in the goods with a right to the immediate possession, and this right of property and possession must concur. Rev. of 1875, p. 484.

3. If the plaintiff had at first a right of possession against the defendant, he had none at the date of his action. He had suffered the lawful owner to retain possession, and the nominal defendant as such owner had sold them to Adams, and Adams alone was entitled to the immediate possession, who is the real defendant in this cause.

4. There are no equities in favor of the plaintiff. He had

it in his power before becoming a receiptor of the property, to have secured himself by a delivery of it to him. This he did not choose to do, and now seeks to recover the property of a bonâ fide purchaser from Stewart. The equities are therefore in favor of the title of Adams and opposed to the plaintiff. Suppose another creditor of Stewart had attached the property after the plaintiff had receipted it and allowed it to remain in Stewart's possession, would the plaintiff be entitled to the action of replevin to recover the property? Clearly not.

PARK, C. J. It does not appear that Daniel S. Adams was a bonâ fide purchaser of the property in question, and he must therefore be regarded as having no greater rights than the defendant Stewart possessed at the time the property was disposed of to him. If he acquired greater rights than Stewart could grant, the burden was upon him to show it. He failed to do this, and the case must therefore be determined by a consideration of the rights existing between the plaintiff and the defendant of record.

It appears in the case that the property in question was attached in the state of Massachusetts in a suit brought against the defendant while he resided there; and that the following receipt was given by the plaintiff to the officer who had attached the property :

[The receipt is given in full in the statement of the case.]

It is claimed by the defendant that the plaintiff acquired no special interest in the chattels under this receipt; and we are referred to a number of cases in the state of Massachusetts as sustaining the claim. But the cases referred to are cases where sheriffs, having attached property, placed it in the hands of third parties for safe keeping merely. Such parties became naked bailees or depositaries of the property. Their possession was the sheriffs' possession; and in contemplation of law the property continued in the hands of the sheriffs.

Waterman v. Robinson, 5 Mass., 303; *Perley v. Foster*, 9 id., 112; *Ludden v. Leavitt*, id., 104; *Warren v. Leland*, id., 265; *Commonwealth v. Morse*, 14 id., 217.

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But such was not the case here. When the sheriff delivered this property to the plaintiff, or to his order, under this receipt, he ceased to have any further care or custody of the property as between him and the receiptor; and the plaintiff was bound to return it to him on demand, or pay all the damages the sheriff might sustain in consequence of his failure so to do. *Bond v. Padelford*, 13 Mass., 394.

Suppose judgment should be rendered against the defendant in the case in which the property was attached, and no property could be found to satisfy the execution issued upon the judgment; no one would question the liability of the sheriff to the plaintiff in that suit. Suppose the sheriff should make proper demand in proper time of the plaintiff in this suit, for a return of the property attached, so that it could be levied upon to satisfy the judgment, and he should fail to return it; no one would question the liability of the plaintiff to the sheriff under this receipt, for so it is written in unmistakable terms.

Now, if the plaintiff has assumed obligations to the sheriff in conformity with law, and the fulfillment of such obligations requires that he should have control of the property, can it be so in Massachusetts that he has no special interest in the chattels? The giving of receipts for property attached is not only lawful everywhere between the parties to them, but the law encourages such transactions, in order to save litigants the trouble and expense attending the keeping of property attached by the sheriff, while the case is waiting for trial. To deprive receiptors of a special interest in goods attached, which may be their only security, is to prevent the giving of receipts. Suppose the plaintiff had delivered the property to a third person for safe keeping *pro tempore*, and such person had refused to re-deliver it on demand made for it by the plaintiff, it may be that by the law of Massachusetts the plaintiff might not have sufficient interest in the property to compel its re-delivery; but this would be owing to the fact that their action of replevin requires a greater interest in property to maintain it than is elsewhere required. In the case of *Waterman v. Robinson*, 5 Mass., 303, it was held that a receiptor of property attached might maintain trespass or

trever for the goods, should they wrongfully be taken from him, but not an action of replevin.

But however it may be in Massachusetts in regard to their action of replevin, suitors coming here are entitled to our modes of redress. Contracts are to be construed, and what rights they confer are to be ascertained, by the law of the place where the contracts are made; but all modes of procedure in obtaining redress are to be governed by the law of the place where suits are instituted. In the case of *Knap v. Sprague*, 9 Mass., 258, the court say: "It is very clear that, after the plaintiff had delivered the chattels he had attached to the defendant, taking her receipt and engagement to be responsible for them upon his demand, they could no longer be considered as in the constructive possession of the plaintiff as constable." And the court further held that the chattels were in the exclusive possession of the receiptor. It would seem to follow from this decision that the receiptor, having the exclusive possession of the property under the receipt, must have been entitled to the possession. In the case of *Bond v. Padelford*, supra, the court hold that a receiptor of property attached, who had suffered the property to remain in the hands of the debtor, might at any time retake the property into his own possession. It follows from this decision that the receiptor was entitled to the possession of the property.

Now, our action of replevin, which was in force at the time this suit was instituted, could be maintained by a party who was merely entitled to the possession of property. Rev. Statutes, 1866, page 75. The cases in Massachusetts hold that the plaintiff was thus entitled under his receipt. Hence he came here invested with such right. He, therefore, could enforce his right by any mode of redress known to our law which was applicable to his case.

The defendant further insists, that inasmuch as the plaintiff never had any actual possession of the property under his receipt, but at the request of the defendant suffered the same to pass into the possession of the latter, he thereby lost his right to the possession of the property. The finding on this subject is as follows: "The plaintiff never had any possession

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of the property under the receipt or otherwise, but it remained in the sole possession of the defendant after the receipt was executed by the plaintiff, in the same manner as before. The receipt was given by the plaintiff at the request of the defendant." This claim comes with poor grace from the defendant. The property was suffered to pass from the sheriff into the hands of the defendant at his request, for his accommodation, in order that he might enjoy the property during the pendency of the suit, and save the expense attending the keeping of the property during that time. The whole object of giving receipts for property attached is to accomplish this end. Property might as well remain in the custody of the sheriff as to remain in the actual possession of the receptor. But this claim is unfounded. It would be a reproach to the law if the defendant could succeed in subjecting the plaintiff in damages, because he indulged the defendant at his request to the extent which he claims. There is nothing in the case tending to show that the plaintiff, when he suffered the property to pass into the hands of the defendant, intended to abandon and did abandon his right to reclaim the possession. He placed the property in the hands of the defendant to be used till he should call for it, just as he might have done in the hands of a third party; and while it remained in his hands, or in the hands of a party with full knowledge of all the facts, it was subject to his call. It is true his right to the possession of the property would be lost if it should pass into the hands of a bonà fide purchaser, or should be attached while in the defendant's hands; but otherwise his right to the possession would continue. It makes no difference in the case that the property passed directly from the sheriff to the defendant, instead of passing through the plaintiff's hands to him, so long as the property went into the defendant's hands by the permission of the plaintiff. The possession of the property by the defendant under such circumstances was the plaintiff's possession, and the plaintiff was entitled to the actual possession whenever he should require it.

We advise a new trial.

In this opinion the other judges concurred.

CHARLES L. PRINDLE, JUDGE OF PROBATE, *vs.* HARVEY HOL-
COMB AND ANOTHER.

45	111
63	850
45	111
73	442

By statute, (Gen. Statutes, tit. 19, chap. 1, sec. 13,) no action is to be brought upon a probate bond without the consent of the probate court, given upon the written application of some party interested. Held that, where a suit was brought without such consent, the matter could be taken advantage of only by a plea in abatement.

The defendants were co-sureties of a testamentary trustee who converted the trust money to his own use and died insolvent, both sureties being able to respond. One of the defendants was appointed trustee, and gave bond, with the other as surety, to well and truly execute the trust. The new trustee presented a claim for the trust money against the estate of the former trustee and received a small dividend thereon. Held that, as both defendants were liable as sureties for the balance of the trust money, the defendant who was trustee was to be regarded as having received the money, and that both defendants were therefore liable on the new bond for his neglect to make certain payments of interest from the trust fund, as required by the trust.

Where a bond is given to execute a trust according to law, it is a breach of the bond not to render the annual account required by statute, even though the probate court has made no order for such an account.

And it does not alter the case that the statute makes it the duty of the courts of probate to require all trustees to render an annual account.

And in all cases where an order is necessary it is one of the duties of the trustee to apply for such an order.

The annual account rendered by a trustee and approved by the court does not conclude the parties.

And *it seems* that the court of probate has no power to settle the final account of a trustee and to determine conclusively the rights of the trustee and parties interested.

The trust was under a will which directed the trustee to pay over the annual interest of the trust fund to D. Held that this duty was complete without an order requiring its payment.

The Superior Court can entertain a suit on such a bond, and can ascertain the damages for a breach of it without a settlement of the trustee's account in the court of probate.

The case of trustees is different in this respect from that of executors and administrators. The latter have to do with the settlement of estates, of which the probate courts have sole jurisdiction; while those courts have not sole jurisdiction of testamentary trusts.

In a suit on a trustee's bond, it was held that there could be no recovery for moneys which the trustee was to pay between the time of bringing the suit and the time of trial, as the suit did not involve a final settlement of all matters between the parties.

DEBT, on a probate bond; brought to the Superior Court in

Litchfield County. The bond, which was in the penal sum of three thousand dollars, was given by the defendant Holcomb, as trustee under the will of Sally Deming; the other defendant, Abraham Herman, being surety. The condition of the bond was as follows:

"The condition of this obligation is such, that if the above bounden Harvey Holcomb, who is appointed and has accepted the trust of trustee under the last will and testament of Sally Deming, late of Canaan, deceased, shall well and truly execute said trust according to law, the provisions of said will, and the orders of court then this obligation is to be void, but on default thereof, to remain and abide in full force, power and virtue."

The provisions of the will creating the trust were as follows:

"I give and bequeath and devise to my brother Charles D. Deming, the use and improvement, during his natural life, of all the real estate I may own at my decease, and of all my household furniture, clothing, stock on the farm and farming tools. * * * And in regard to all other personal property belonging to me at my decease, whether in moneys, notes, bonds, mortgage or otherwise, I hereby direct that the same shall be held by my executor in trust, during the natural life of the said Charles, and I hereby direct my said executor to collect and dispose of the same at his discretion, and all the avails thereof to loan upon mortgage, or other sufficient security, and to pay over annually the interest and annual avails thereof to the said Charles during his natural life, for his own sole use."

A committee, to whom the case was referred, made the following finding of facts, (omitting the part relating to the bond and will:)

Subject to objections to the testimony, which objections are fully stated in a subsequent part of my report, I find that at her death Sally Deming left personal estate (other than clothing, household furniture, farming tools and stock on her farm,) of the value of \$2,522.48, which became and was the trust fund, the interest and avails of which were annually to

be paid to Charles D. Deming as provided in the will. Mr. Higley, the trustee named in the will, accepted the trust and administered it until 1859, when he resigned and Edward P. Hunt was appointed trustee. Mr. Hunt resigned in 1868, and John H. Scott was on the 18th of June, 1868, appointed trustee, and with the defendants, Herman and Holcomb, as sureties, gave bond for the faithful discharge of the trust. Mr. Scott died April 30, 1871, badly insolvent. During his life he converted the trust fund to his own use, and at his death was indebted to the fund in the sum of \$1,921.23, that amount being then the entire remaining principal of the fund. The trusteeship remained vacant until November 6th, 1871, when the defendant Holcomb was appointed trustee, and with the defendant Herman gave the bond now in suit. Hunt, at the time of his resignation, June 18th, 1868, settled his account as trustee with the court of probate, the principal of the fund then in his hands being \$2,448.46. Since that time there has been no settlement of the trust account before the court, and no citation was issued by the court calling upon Mr. Scott, or upon the defendant Holcomb, to render an account. The defendant Holcomb, as the successor of Mr. Scott in the trusteeship, presented a claim against his estate for the amount of \$1,921.23, and received by way of dividend \$134.48, and has not otherwise received any of the trust fund; but Mr. Herman, the co-surety with Mr. Holcomb upon Mr. Scott's probate bond, is and always has been able to respond to the obligation which the bond imposes on him. Mr. Holcomb is also able thus to respond, but the bond has never been enforced, and since the death of Mr. Scott nothing has been paid to Charles D. Deming, as interest, or income, or as part of the fund.

Upon these facts, as between Charles D. Deming and the defendant Holcomb, Holcomb is, in my opinion, justly chargeable with interest at the rate of six per centum per annum on the sum of \$1,921.23, from the time of the death of Mr. Scott, April 30th, 1871; that is, is justly chargeable with the sum of \$115.27, payable April 30th, 1872, of \$115.27, payable April 30th, 1873, and of \$115.27, payable April 30th,

1874; and is also justly chargeable with interest on these several sums from the time they became payable as above down to the time judgment may be rendered in the case; and the defendant Herman is as surety jointly liable with Holcomb as above.

I therefore find the issue for the plaintiff, and that he as judge of probate recover of the defendants, for the use and benefit of said Charles D. Deming, the sum of \$345.81, with interest from the times the several sums making this amount fell due.

The counsel for the defendants excepted to the admissibility of the evidence offered to prove the facts which I have as as above found, and the testimony was by me received, subject to the exception to be acted upon by the court. The objections and exceptions taken by the counsel for the defendants were,

1st. That the allegations in the plaintiff's declaration are not such as to warrant the introduction of proof in support of the several facts by me found.

2d. That it being admitted (as it was) that the defendant Holcomb was never cited to render an account as trustee by the court of probate, he cannot be made liable in this suit in the manner found.

3d. That the court of probate has sole and exclusive jurisdiction to settle Mr. Holcomb's trustee account, and that until found in default by that court he cannot be sued on his bond and made accountable in the manner I have found him to be.

4th. That it was not shown, (as it was not,) that this action was brought with the consent of the court of probate given upon written application of some party interested.

In the foregoing report, I have made no finding in respect of charges falling due since the date of the plaintiff's writ, August 10th, 1874, but subject to the defendants' objection the parties were heard in respect to such subsequent charges, and if, in the opinion of the court, the evidence is admissible, I find that Holcomb as principal and Herman as his surety are justly chargeable in the further sum of \$115.27, payable April 30th, 1875, and \$115.27, payable April 30th, 1876, with

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interest from the time said sums became payable, which sums are unpaid and remain due to said Charles D. Deming.

The report of the committee was accepted, and the case reserved for the advice of this court.

D. J. Warner and *D. T. Warner*, for the plaintiff.

1. Holcomb was appointed trustee in November, 1871. By his acceptance of the trust and presentation of his claim as trustee for the amount of the trust fund remaining, (\$1,921.23,) against the estate of Scott, and receiving the dividend thereon, he acknowledged his obligation to make the trust fund good by reason of his being co-surety with Herman on Scott's bond. He is presumed to have made the trust fund good out of his own estate and that of his co-surety; and his duty as trustee under the will was to secure the trust fund by mortgage or other sufficient security. The amount of the fund is therefore to be considered as so much money in his hands. *Davenport v. Richards*, 16 Conn., 316.

2. It was not necessary that Holcomb should be cited before a court of probate to render an account of his trusteeship. It was his own default and neglect that he did not render his account, and he cannot take advantage of his neglect and wrong. It was a breach of his bond that he did not return an inventory and render his account. *Warren v. Powers*, 5 Conn., 382; *Rowland v. Isaacs*, 15 id., 122; *Davenport v. Richards*, 16 id., 320; *Moore v. Holmes*, 32 id., 561.

3. The court of probate has not sole and exclusive jurisdiction in this case, and it was not necessary that Holcomb should be found in default by that court before he could be sued on his bond. *Moore v. Holmes*, 32 Conn., 560. This bond was given for the protection of the *cestui que trust*. Its condition was that the trustee should safely invest the trust fund in mortgage or other sufficient securities, and annually pay over to the *cestui que trust* the interest. What necessity of having an order from a court of probate directing him to pay it? The trustee knows the amount of the fund and the interest that accrues upon it, and the direction of the will is that it shall be paid to the *cestui que trust*. The judge of

probate, knowing that the trustee has not performed his duty in these respects, brings his suit on the bond for the benefit of the *cestui que trust*. This action is the peculiarly appropriate remedy whereby the *cestui que trust* can obtain his rights. *Adams v. Spaulding*, 12 Conn., 357; *Davenport v. Olmstead*, 43 id., 67. In case of a guardian, a suit may be brought on his bond in the Superior Court without any settlement of his account before the court of probate. *Davenport v. Olmstead*, supra. A like rule prevails in testamentary trusts. *Moore v. Holmes*, 32 Conn., 576. An action of debt on a probate bond is a proper remedy for a breach of the bond, and the amount to be recovered is to be determined by the proof. *Clarke v. Mix*, 15 Conn., 173.

4. The statute requiring the consent of the court of probate before bringing a suit on a probate bond did not go into effect until after this suit was brought. If it did, the objection could not be taken so late, but must have been by plea in abatement.

5. The plaintiff claims that he is entitled to recover not only the interest due on the trust fund down to the date of the writ, but also what may be due at the time judgment shall be rendered in the case. The action is upon the bond, and at common law the whole penalty of the bond is the rule of damages, and the defendant would be compelled to go into a court of chancery to get a reduction. But by statute the courts shall find and assess such damages as are justly and equitably due. Gen. Statutes, p. 444, sec. 1; *Rowland v. Isaacs*, 15 Conn., 122; 1 Swift Dig., 678. In actions of account it is settled that the account may be taken up to the time of making the award, and this upon the principle of doing justice to the parties. *Smith v. Brush*, 11 Conn., 359; *Holabird v. Burr*, 17 id., 556; *Day v. Lockwood*, 24 id., 194-5.

C. B. Andrews and *L. P. Dean*, for the defendants.

1. The account of a testamentary trustee cannot be settled in a court of law; and surely not in an action brought on a bond. All matters of trust, and especially testamentary trusts, are within the exclusive jurisdiction of the court of

probate; and more particularly is this true of the stating of trustee's accounts. Gen. Statutes, p. 367, secs. 2 to 6. If the probate court does not have exclusive jurisdiction over these matters, then they fall within the jurisdiction of a court of chancery. *Donalds v. Plumb*, 8 Conn., 455; *Parsons v. Lyman*, 32 id., 566. A court of law can never have jurisdiction to state the account of a testamentary trustee.

2. The defendants cannot be made liable on this bond until Holcomb has been found in default by the probate court. The very terms of the condition upon which the bond is to be held good are that Holcomb shall perform his duty as trustee under the will of Sally Deming "according to law, the provisions of said will, *and the order of court.*" It is admitted that he has never been cited into the court of probate. Clearly then he has never failed to perform any order of that court. A suit on a probate bond is the remedy to recover damage for some official misconduct of the party giving the bond. This official misconduct must be established by the probate records themselves. The rule in all analogous cases shows that it cannot be proved *aliunde*. *Bacon v. Fairman*, 6 Conn., 128; *Edmond v. Canfield*, 8 id., 87; *Bailey v. Strong*, id., 281; *Beach v. Norton*, 9 id., 196, 198; *Atwater v. Barnes*, 21 id., 242. This rule ought to apply with all rigor to a suit on this bond, where the sole ground of liability is the disobedience to some order of court. *Davenport v. Olmstead*, 43 Conn., 67.

3. The plaintiff's whole case must fail because it was not brought "with the consent of the court of probate, given upon the request of some party interested," as required by the statute. The language of the statute is, "No action shall be *brought* upon a probate bond, unless, etc." Gen. Statutes, p. 400, sec. 13. This is an express inhibition that can not be waived.

CARPENTER, J. This is an action on a probate bond conditioned that the defendant Holcomb, as a testamentary trustee, should faithfully discharge the duties of the trust, alleging a breach, &c. The facts were found by a committee, and the

question as to what judgment shall be rendered upon the facts was reserved for the advice of this court.

1. The defendants object that the plaintiff cannot recover for the reason that the action was brought without first obtaining the consent of the court of probate, given upon the written application of the party interested. This is required by statute, Revision of 1875, p. 400, sec. 13. By the margin it would seem that it was enacted by the legislature in 1874, but we are unable to find any such statute in the session laws of that year. As it does not previously appear we infer that it was inserted in the revision by the revisors, and became law only by force of the act adopting the revision. We think it is quite clear that it could have no force prior to January 1st, 1875, when the revised statutes took effect. This suit was brought in August, 1874, and was well brought as the law then stood.

But if it be conceded that the law was then in force, we think it cannot be taken advantage of at this stage of the cause. It should have been pleaded in abatement. Not so pleading it, but taking the chances of a favorable result of a trial upon the merits, the defendants waived the objection.

2. An objection is made to the admission of evidence on the ground of a variance. The bond described in the declaration was given by the defendants conditioned that the defendant Holcomb, trustee under the last will and testament of Sally Deming, should well and truly execute said trust according to law, &c. Under this declaration the committee received proof that the defendants, in the year 1868, executed a bond to the judge of probate, as sureties of John H. Scott, trustee under said will, that said Scott converted the trust fund to his own use, that he died April 30th, 1871, insolvent, that the amount of the trust fund was then \$1,921.23, that the defendant Holcomb was subsequently appointed trustee and presented a claim against the estate of said Scott for the amount of said trust fund and received thereon a dividend amounting to \$134.48, that he did not otherwise receive any of the trust fund, and that the defendants are abundantly able to respond to the obligation imposed upon them by said bond.

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We think this evidence was admissible for the purpose of proving a breach of the bond in suit. It established the fact that Holcomb as trustee had a claim against himself as an individual and the defendant Herman, and that both himself and Herman were able to pay it. That it was his duty to collect the same cannot be questioned. It was not necessary that he should sue himself and his co-surety and obtain judgment, nor was it necessary for him formally to set apart the money or other property as the trust fund. If he did nothing of the kind he in effect assumed the liability and chargeu himself with the annual interest. There was so much money due on Scott's bond, and nothing more could be collected of his estate. The balance was collectible of the sureties, and a reasonable time for payment had elapsed. As one of the sureties had been appointed trustee and had accepted the trust the money was payable from him as an individual to himself as trustee. Under these circumstances it will be considered and treated exactly as if the money was in Holcomb's hands as trustee, and the law will charge him with the interest accordingly. *Davenport v. Richards*, 16 Conn., 310, is a case directly in point.

3. It is next objected that the defendant Holcomb has never been cited to render an account to the court of probate, that he has disobeyed no order of that court, and that the probate records do not show any official misconduct; therefore it is claimed that the defendants cannot be made liable in this action.

If the plaintiff relied upon the defendants' failure to comply with some order or decree of the court of probate as the breach of the bond for which he claims to recover, there might be some force in this claim. But that is not the ground of the action. It will be noticed that the condition of the bond is that the trustee "shall well and truly execute said trust according to law, the provisions of said will, and orders of court."

The law requires him to render to the court of probate an annual account. This he has not done. It is no excuse that the court has not directed him to do it. No order of the

court requiring him to perform this duty is necessary. The statute itself is a standing order. It is true the language of the act as it now stands is that "courts of probate shall require all guardians, &c., to render an account;" but that is to be interpreted, not as making the duty of the trustee contingent upon a prior order of court, but as requiring the court of probate to enforce this duty by removal if need be. This is obvious from the fact that in all cases where the estate is more than five hundred dollars the duty is imperative to render an annual account; when it is less an account is to be rendered only when required by the court of probate. It is further apparent from the language of the act as originally passed in 1853, which is that all guardians, trustees, and conservators "shall annually render their respective accounts, &c."

The will of Sally Deming requires the trustee to pay over annually to Charles D. Deming the interest and avails of the trust estate. This he did not do, and this is the principal breach assigned. This duty is imposed by the will. An order from the court of probate directing performance will not strengthen the duty and is unnecessary. Withholding an order or even prohibiting performance will not release the obligation. Moreover, where prior orders are necessary, as in cases of distribution, there it is the duty of the executor, administrator or trustee, as the case may be, to procure such order. His failure to do so is itself a breach, and will not excuse any further neglect of duty. This objection to the plaintiff's recovery therefore ought not to prevail.

4. The next and last objection is, that the court of probate has sole and exclusive jurisdiction to settle the trustee's account, and that until found in default by that court he cannot be made accountable in an action on his bond.

This objection assumes that the object of the suit is to compel the trustee to state his account. The defendants' counsel in their brief state it thus: "Upon the trial of this case the plaintiff sought, not to make the defendants liable for any ascertained default, but to state the trustee's account." This is not an accurate and full statement of the object of

this suit. It is true the omission of the trustee to render an account of his doings with the trust estate, is alleged, inferentially at least, as a breach of the bond; but there is a more important breach directly and explicitly alleged, and that is, his neglect to pay over to Charles D. Deming the interest and avails of the trust property. To compel such payment we regard as the object of the suit. In order to recover the plaintiff must prove the bond, the breach, and the damage. The damage is proved by showing the amount of the trust fund—it being the same as money in this case—and the law charges him with the interest. Strictly speaking it is no part of the plaintiff's case to show the state of the trustee's account. If the trustee desires to reduce the damages, it is incumbent on him to show his disbursements and the value of his services. If, as he now claims, he cannot do it in this action, it is his misfortune. He, and not the plaintiff, should suffer. Had he done his duty and rendered his account the probate records would have shown the true state of his account. He cannot now take advantage of his neglect to do so and set it up as a defense to this action.

But we regard the matter of stating an account as a mere incident, and that it is competent to state it in this action, so far at least as may be necessary to ascertain the just amount of damages. The cause is unquestionably within the jurisdiction of the Superior Court. That there has been a breach of the bond cannot now be denied. It would be almost an absurdity to hold that the court cannot lawfully determine the amount of damages. There may be cases in which some finding or decree of the court of probate will measure the damages to be recovered in the Superior Court in an action on the probate bond. But in such cases generally, if not always, it will be found that the probate decree is essential to establish the liability, as well as the damages, without which there is no breach; as where an executor or administrator refuses to pay over a distributory share of an estate, or, in the case of insolvent estates, to pay the amount due creditors.

In this case the liability is susceptible of proof without an order of court. The liability being fixed the question of

damages alone remains. The court before which the action is pending must necessarily have the power to determine that question unless there is something in the nature of the case or in the provisions of the statute which confers jurisdiction of that question upon some other tribunal.

There is no inherent difficulty in determining it before the, Superior Court, and no special reason why it should be done by the court of probate. The argument of the defendants assumes that testamentary trustees stand upon the same footing with executors and administrators. Executors and administrators are charged with the duty of settling estates, over which courts of probate have sole and exclusive jurisdiction. It is important that the probate records should show all the proceedings relating to such settlements; hence the propriety and necessity of requiring administrators' accounts to be settled in that court. But with testamentary trustees it is different. Ordinarily they take the trust property after the estate is settled and distribution or a partial distribution is made, and hold it for the purposes of the trust. These trusts are created by will, and the relations existing between the trustee and the cestui que trust are not essentially different from those existing in cases of ordinary common law trusts. Over such trusts courts of probate will exercise no jurisdiction except as it is conferred by statute. Cases of testamentary trusts probably were not frequent prior to 1822, as we find no reference to them in the statutes before that year. Such as may have existed were doubtless regulated and controlled by the General Assembly, or by courts of equity after equity powers were conferred upon the courts in 1778. In 1822 a statute was passed providing that, in case of the death or incapacity of a trustee appointed by will, or of his refusal to accept, the court of probate "shall appoint some suitable person or persons to execute said trust according to the will, taking from them good and sufficient bonds with surety conditioned for a faithful performance thereof." Thus the law stood until 1831, when courts of probate were authorized to remove trustees for cause; and in 1832 an act was passed regulating proceedings upon the resignation of trustees and

providing for the appointment of others in their stead. The next change made was in 1853, when the act was passed requiring trustees, conservators and guardians to render annual accounts to the court of probate.

Under the statutes in force prior to 1853 it will hardly be claimed that a settlement of the trustee's account in the court of probate was essential to the maintenance of an action on his bond. No such settlement was provided for by statute, and probate courts had no such power unless it existed previous to the statutes. That it did not previously exist is apparent when we consider that it is essentially an exercise of chancery powers and glance at the history of courts and equity and probate jurisdiction in this state. The "General Court" had sole jurisdiction of equity causes until 1778, when jurisdiction was conferred upon the county courts in all matters not exceeding £200, and upon the Superior Court in all matters exceeding £200 and not exceeding £800, reserving to the General Court jurisdiction in all matters above the latter sum. Courts of probate, as separate tribunals, were first constituted in the year 1698. In the early history of the colony the ordinary courts of justice—the "Particular Court" or "Court of Magistrates," as it was sometimes called, entertained jurisdiction of "Wills and Inventories." In 1666 counties were organized and probate jurisdiction was conferred upon the county courts. *Col. Records*, Vol. 2, pages 34–39. In 1698 the judge of the county court, with two justices of the quorum, were constituted a "court for the probate of wills, granting administration, and appointing and allowing of guardians, with full power to act in all matters proper for a prerogative court." *Col. Records*, Vol. 4, page 268. In 1699 (same volume, p. 307,) courts of probate were authorized to call administrators to account "for and touching the goods and estate of such deceased person." In 1784 that provision was extended to executors, and has remained a part of the statute laws of this state until this day. Revision of 1875, p. 393, sec. 32.

As thus constituted courts of probate were courts of special and limited powers, and had such jurisdiction only as was

expressly conferred by statute. If an express statute was required to authorize them to call executors and administrators to account, it will not be presumed that they had powers to call testamentary trustees to account in the absence of any such statute. If equity jurisdiction was so sparingly conferred, and to a limited extent only, upon the higher courts, it affords strong reasons for presuming that courts of probate did not exercise such jurisdiction without express authority.

It follows that the court of probate had not jurisdiction of the settlement of Holcomb's account as trustee unless such jurisdiction was conferred by the act of 1853. That act requires all guardians, trustees and conservators annually to render an account for the year next preceding, embracing therein an inventory or schedule of the estate held by them, the estimated value of the same, the amount of income, interest, issues and profits thereof during the year, and the amount paid or proposed to be paid for the support of, or as dividends to, or for the person or persons for whose benefit the estate is held. Such accounts are to be sworn to, and a neglect or refusal to render the same is to be deemed a refusal to perform the duties of the trust.

It will be noticed that the language of this act refers to an annual account to be made to the court of probate, and not to a final settlement with the person or persons ultimately entitled to the trust fund or the income therefrom. There is no provision for notice to other parties interested, none for enforcing any order or decree, and indeed none for compelling any account to be rendered. It is apparent therefore from what the act says and from what it omits to say, that the legislature did not contemplate by the account required a final and conclusive determination of the rights of the parties.

Suppose the trustee had rendered his account and had omitted from the inventory or schedule some item of the trust property, or had neglected to charge himself with some portion of the income received; the acceptance of his account by the court would be no defense to an action on his bond to recover the value of the property so omitted. That was held in the case of an executor even after there had been a final

settlement of his administration account. *Moore v. Holmes*, 32 Conn., 553. Suppose he had credited himself with a sum of money paid to the person entitled to the income which in fact was never paid. For the same reason and upon the same principle he would still be liable therefor on his bond. Suppose further that he should refuse to render any account; what power has the court of probate except to declare the trusteeship vacant and appoint another in his place? In that event what remedy has the cestui que trust, if the theory of the defendants is correct, that his account can only be settled in the court of probate?

These reasons seem to us sufficient to justify the conclusion that the accounts required by the act of 1853 do not conclude the parties, and that there is little or no room for inferring that the court of probate has power to settle the final accounts, and determine conclusively the rights of trustees and parties interested in the trust estate. The Circuit Court of the United States, in this district, took the same view of the statute under consideration. *Parsons v. Lyman*, 32 Conn., 566.

It is competent therefore for the Superior Court to determine the question of damages in this action.

We see no reason for sanctioning the claim of the plaintiff that he is entitled to recover the interest accruing since the commencement of this suit, as this is not a final settlement of all matters between the parties.

We advise the Superior Court to render judgment for the plaintiff for the amount of interest due at the time this suit was commenced.

In this opinion the other judges concurred.

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SUPREME COURT OF ERRORS.

NEW HAVEN COUNTY.

JUNE TERM, 1877.

Present,

PARK, C. J., CARPENTER, PARDEE AND GRANGER, JS.

JONATHAN W. POND vs. WATTS COOKE AND ANOTHER.

Where property has once vested in an assignee or receiver by the law of the state where the property is situated, the law of another state will not divest him of his right to it, if he should take it into such state in the performance of his duty.

A receiver of an insolvent manufacturing corporation appointed by a court in New Jersey where it was located, took possession of its assets, and for the purpose of completing a bridge which it had contracted to build in this state, purchased iron with the funds of the estate, and sent it to this state. Held—that the iron was not open to attachment in this state by a creditor residing here.

And held that a party giving a receipt for the property to the officer who attached it, and taking it into his possession, was not liable to nominal damages in a suit brought upon the receipt after a demand and refusal.

A receiver appointed by a court in such a case stands in the same position as an assignee or trustee in insolvency.

ASSUMPSIT on a receipt given by the defendants to the plaintiff, a deputy sheriff of the county of New Haven, for certain property attached by him in a suit against the Watson Manufacturing Company; brought to the Superior Court. The following facts were agreed upon.

The Blake Crusher Company, a corporation located in New Haven, brought a suit to the Court of Common Pleas for New Haven County, at its October term, 1876, against the Watson Manufacturing Company, a corporation located in Paterson, in the state of New Jersey, and William G. Watson, of said Paterson, and recovered judgment against the defendants in

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December of that year. When the suit was brought, Pond, the present plaintiff, being the officer serving the writ, attached as the property of the Watson Manufacturing Company and Watson, or one of them, a quantity of iron which had been brought to New Haven by Watts Cooke, the receiver of the company, and one of the defendants, for the purpose of building a bridge over the West River, in pursuance of a contract then existing between the towns of New Haven and Orange on the one part, and the Watson Manufacturing Company on the other.

To release the iron from the attachment the receipt in suit was executed by the defendants in this case to the plaintiff as the officer making the attachment.

The attached property was used subsequently to the attachment in the construction of the bridge under the contract, by Watts Cooke, as receiver of the company. The payments provided for by the contract were all made as provided for, to Watts Cooke, and all the provisions of the contract on one side and the other were duly complied with. The proceedings appointing Cooke receiver, and fixing his power by the court in New Jersey, were all legal under the laws of that state. The iron was purchased by him as receiver, and paid for with the funds of the estate in his hands, and came into this state marked "Watts Cooke, Receiver," and had this mark on it when attached.

There was no assignment of the attached property, or of any other property of the Watson Manufacturing Company, or of William G. Watson, for the benefit of creditors or otherwise ever recorded in this state, nor had there been any proceedings under the insolvent laws of this state, nor in bankruptcy, relating to them or either of them.

The only issue between the parties is whether the property so attached was legally liable to such attachment.

Upon these facts the case was reserved for the advice of this court.

H. T. Blake, for the plaintiff.

1. The making of the receipt and the refusal to deliver

pursuant to its terms being admitted, the plaintiff is, in any event, entitled to judgment for nominal damages and costs. Sedgwick on Damages, 47, 53, 54; *Allen v. Woodford*, 36 Conn., 143; *Norris v. Bridgham*, 14 Maine, 429; *Moulton v. Chapin*, 28 id., 507; *Cooper v. Mowrey*, 16 Mass., 5, 9.

2. A receiver appointed by order of court has the *custody* of the property merely, not the *title*. High on Receivers, §§ 1, 5; *Ellis v. Boston, Hartford & Erie R. R. Co.*, 107 Mass., 28. The receiver has not only no personal interest in the estate, but even his possession is only the possession of the court. High on Receivers, § 4 and note; *Beverly v. Brake*, 4 Gratt., 211; 1 Story Eq. Jur., § 828. The estate is merely property taken out of the possession of its owner by the local law for application to the payment of the owner's debts; but even while it thus remains subject to the control of the local law the *ownership* is unchanged. It is like property held by a sheriff under attachment. High on Receivers, § 2.

3. When the property in question was removed outside of the jurisdiction of the local law into Connecticut, it was no longer in the possession of the New Jersey court, and being still the property of the Watson Manufacturing Company, came under the control of the laws of Connecticut, with respect to the mode of its application for the payment of debts. High on Receivers, §§ 239, 240. In such a case the debtor's property found in this state is liable to attachment under our laws. This is the recognized rule, even when the attachment is made subsequently to the appointment of the receiver. High on Receivers, § 47 and note; *Taylor v. Columbian Ins. Co.*, 14 Allen, 353; *Abraham v. Plestoro*, 3 Wend., 550; *Hoyt v. Thompson's Ex'r.*, 19 N. York, 224; *Willits v. Waite*, 25 id., 577, 586; *Booth v. Clark*, 17 How., 331, 337; *Hunt v. Columbian Ins. Co.*, 55 Maine, 298; Story Conf. Laws, § 414; 2 Kent Com., 406; *Taylor v. Geary*, Kirby, 313; *Upton v. Hubbard*, 28 Conn., 287.

4. Since the appointment of a receiver by a local court does not *change the title* of the property, and has no force outside the jurisdiction of the court, it is very different in its effect from a *bonâ fide* assignment of the debtor transferring

the title for a valuable consideration. Such an assignment to a particular creditor, if it *actually vested the title* in the state where made, would be held good in this state. High on Receivers, § 244; *Ballard v. Winter*, 39 Conn., 182; *Johnson v. Hunt*, 23 Wend., 87, 94; *Hoyt v. Thompson's Exr.*, 19 N. York, 224; *Booth v. Clark*, 17 How., 331, 337. But an extra-territorial assignment in trust for the benefit of all the creditors, though good in the state where made, is void in this state unless recorded in the probate office of the district where the property is situated. Gen. Statutes, tit. 18, ch. 11, part 2, sec. 1; *Richmondville Manuf. Co. v. Prall*, 9 Conn., 487. And the property would be subject to attachment. *Id.*, 494; *Zipcey v. Thompson*, 1 Gray, 243; *Fall River Co. v. Croade*, 15 Pick., 11; *Weans v. Hapgood*, 19 *id.*, 105. The real question then seems to be whether the property or money of a New Jersey debtor found in this state is subject to the laws of this state, or to the laws of New Jersey, as respects its application in this state to the payment of debts. Our law provides that a debtor's property in Connecticut shall be liable to attachment, unless protected by some special provision of statute. Can a New Jersey receiver, having no official authority in this state, not amenable to any of our courts, or held by any bonds that can be here enforced, set aside that statute liability and prevent our own citizens from using the courts and legal proceedings of this state for the collection of their debts? *Booth v. Clarke*, 17 How., 331; *Runk v. St. John*, 29 Barb., 585; High on Receivers, § 241 and note.

S. L. Bronson, contra.

1. At the time of the appointment of the receiver, the corporation, its assets, and the receiver himself were all in the state of New Jersey, and the receiver took immediate possession of the property and it remained in his possession until the attachment. We say, then, the *lex rei sitae* ought to prevail. The distinctions existing in our American law between the law of domicil and that of *rei sitae*, can have no application here, as the property was in New Jersey at the time of the appointment of the receiver. Wheaton's Conflict

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of Laws, § 334 to § 392, and § 844, with cases cited. 3 Parsons on Contracts, 455, with cases there cited; *Wales v. Alden*, 22 Pick., 245; *May v. Wannemacher*, 111 Mass., 202; *Wood v. Parsons*, 27 Mich., 159; *Kelly v. Crapo*, 45 N. York, 86; *S. C.*, 16 Wall., 610; *Mead v. Dayton*, 28 Conn., 33; *Upton v. Hubbard*, id., 274; *Koster v. Merritt*, 32 id., 246; *Clark v. Conn. Peat Co.*, 35 id., 303.

2. The fact that the attachment was invalid against the receiver, is a full defence to this action. The property was delivered up by the receiptors to the true owner, "Watts Cooke, Receiver." That true owner was a third party, and not one of the receiptors. No reason can be given in this case why the receiptor should be estopped. The officer attached the iron marked "Watts Cooke, Receiver," and knew therefore of his claim upon it in that capacity.

PARK, C. J. The defendant was appointed a receiver of the insolvent Watson Manufacturing Company by the court in the state of New Jersey where the company was incorporated and its assets were located. The defendant under his appointment took possession of the property and assets of the company, and as receiver purchased the iron in question in this case, and had it prepared for the construction of a bridge between the towns of New Haven and Orange in this state. The iron was thus prepared in the state of New Jersey, whence he had it shipped to New Haven to his address as receiver. The Watson Manufacturing Company had previously made a contract with the towns of New Haven and Orange for the construction of the bridge, and what the defendant did was done to carry out and complete the contract, for the benefit of the creditors of the company.

¶ Thus it appears that the property was in the possession of the defendant as receiver when it came into this state. He was invested with it, and was legitimately performing the duties of his appointment in completing the contract by its use when it was attached by the plaintiff. In these circumstances comity among the states requires that the case should be regarded by our courts precisely as it would have been by

the courts of New Jersey if the controversy had arisen there. In the case of *Wales v. Alden*, 22 Pick., 245, an inhabitant of Boston being in New York, an assignment of goods and choses in action was made to him in trust for the benefit of the creditors of the assignors, who were inhabitants of New York. The trustee took possession of the property in New York, but did not remove it out of the state. On his return to Boston he was served with process of garnishment by a creditor of the assignors living in Massachusetts. The claim of the creditor was based upon the assignment in New York. He insisted that by the maxim of law personal property follows the person, and that consequently the property assigned was with the trustee in Massachusetts; and that inasmuch as the assignment was made under the laws of New York, which had no effect in Massachusetts, he had obtained the prior right by his attachment. The court, in commenting upon this claim of the creditor, said—"The trustee took the goods for a lawful purpose, and by a title indefeasible where the transaction took place, and under the laws of New York, to which he was amenable. He was bound, as well in conscience as by law, to execute the trust according to the terms of the conveyance under which he took the property. His coming into this commonwealth ought not to defeat such a conveyance, and discharge him from his legal and conscientious obligations, even though it should be held that, if such an assignment had been made here, it could not hold against attaching creditors." In the case of *Clark v. The Connecticut Peat Company*, 35 Conn., 303, a debt was attached in this state which was owed to creditors in Massachusetts, but which had previously been assigned in that state to a party residing there, and it was held that the assignment, being good by the law of Massachusetts, was good against the attaching creditor. Judge HINMAN, in giving the opinion of the court, said—"If by the law of Massachusetts the plaintiff acquired a valid title as assignee of this debt by the assignment before the attachment here, how can that attachment in any way affect that title? When a legal title is once vested by a sale valid in the place where made, its validity should be recognized

everywhere." See also *Mead v. Dayton*, 23 Conn., 33, and *Koster v. Merritt*, 32 Conn., 246.

But it is said that in the case at bar the receiver was appointed by the court in New Jersey, in conformity with the local law of the state, which had no authority beyond the limits of the state, and that consequently when the property came here it came free from all the right and title which the receiver had to it while it remained in the state of New Jersey. There would be force in this claim if the property was here when the receiver was appointed in New Jersey, and the receiver had never taken possession of it previous to the attachment by the plaintiff. In that case the local law of New Jersey could not vest property in the receiver which was located here. *Upton v. Hubbard*, 28 Conn., 274; *Paine v. Lester*, 44 Conn., 196; *Taylor v. Columbian Ins. Co.*, 14 Allen, 353; *Willits v. Waite*, 25 New York, 577. And many other cases might be cited to the same effect. But when property has once vested in a trustee, assignee, or receiver, by the law of the state where the property is situated, it makes no difference whether it is done under the local law of the state or under the common law. The law of another state will not divest the trustee, assignee or receiver of his right to the property, should he take it into such state in the performance of his duty. The courts of such state will inquire whether he has such right to the property when it comes into the state as between himself and their own citizens, but when the fact that he has such right is ascertained they will not regard it as important by what mode the right was acquired. In the case of *Crapo v. Kelly*, 16 Wallace, 610, where personal property located in Massachusetts was transferred to an assignee by proceedings in insolvency under the local laws of that state, and the property afterwards being in New York was attached by a creditor of the insolvent residing there, it was held that the assignee had the prior right to the property. The case had been previously decided by the Court of Appeals in the state of New York. 45 New York, 86. Although the court came to a different result from the decision in Wallace, still the two courts harmonized, so

far as the law under consideration is concerned. The only difference between that case and the one at bar consists in the fact that an assignee was appointed in that case and a receiver in this. The case cited from the 22 Pickering scarcely differs from the present in any other respect. The court would not allow the fiction of law, everywhere established, and in no state more than in Massachusetts, that personal property follows the person, to give a preference to the attaching creditor. But the object to be accomplished by the appointment of an assignee in those cases, and a receiver in this, was the same. Each was appointed to settle the estate and divide the property among the creditors of the insolvent. Calling the administrator of the estate in such cases by different names does not alter his character or the nature of his duties. A receiver, appointed under the statute of New York directing proceedings against insolvent corporations, is a standing assignee, vested with nearly all the powers and authority of the assignee of an insolvent debtor. 4 Paige, 224. One of the modes in the state of New Jersey to settle the insolvent estate of a corporation, under their statute, is by the appointment of a receiver. And whether the title to the property in such case passes to the receiver, or remains technically with the corporation, is a matter of no importance, so long as the property is taken from the corporation, and placed in the hands of the receiver, with full power, under the direction of the court, to settle the estate of the corporation. The plaintiff refers us to High on Receivers, and insists that a receiver has only the custody of the property committed to his keeping. But the author, in the references cited, is merely treating of receivers appointed *pendente lite*, under the ordinary powers of a court of chancery. Such references throw no light upon the pending question.

The statute of New Jersey under which this receiver was appointed authorizes proceedings against insolvent corporations, like the Watson Manufacturing Company, to settle their estates by dividing their property among their creditors in a similar manner to other insolvent statutes in other states where trustees are appointed. Obviously, in the state of New

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Jersey the property in question could not have been taken from the receiver by a creditor of the corporation; and we think it should not be done here. We think the case should be treated here precisely as it would have been by the courts of New Jersey if the controversy had arisen there.

The only remaining question to be considered is, whether the defendants have made full defence in the pending case. We think the cases of *Clark v. Gaylord*, 24 Conn., 484, *Fitch v. Chapman*, 28 Conn., 257, and *Dayton v. Merritt*, 33 Conn., 184, are decisive of this question in favor of the defendants, and further comment in regard to it is unnecessary.

We advise judgment in favor of the defendants.

In this opinion the other judges concurred.

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STATE *ex rel.* LINUS BIRDSEY AND ANOTHER *vs.* MARCUS E. BALDWIN AND ANOTHER.

It is provided by sec. 1, ch. 2, tit. 3, of the General Statutes of 1875, that county commissioners shall be appointed by the General Assembly for New Haven County, their powers and duties and terms of office being fixed by later sections of the same chapter. In 1877 the legislature passed an act as follows:—
“Sec. 1. So much of sec. 1, ch. 2, tit. 3, of the Gen. Statutes as provides that county commissioners shall be appointed for New Haven County is hereby repealed, and the board of county commissioners of New Haven County is hereby abolished. Sec. 2. A board of commissioners for New Haven County is hereby created, to be appointed by the General Assembly, and said board shall perform in and for New Haven County all the duties and have all the powers provided by chap. 2, tit. 3, of the General Statutes for county commissioners.” Later sections made the same provisions as the former law with regard to their number and terms of office, and the act was made to take effect on its passage. Held that the instantaneous re-enactment by the second section of the same act that was repealed by the first, rendered the repeal inoperative and left the former law in force, and that the commissioners appointed under the old law and whose terms had not expired remained in office.

The legislature has power to repeal a statute under which an incumbent of an office has been appointed to and holds the office for a term not yet expired; and the office expires with the repeal of the statute.

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INFORMATION in the nature of a writ of *quo warranto*; filed by the Attorney for the State in the Superior Court for New Haven County at its January term, 1877.

The information alleged that the relators, Linus Birdsey and John W. Lake, were duly appointed by the General Assembly county commissioners for New Haven County, the former at the May session in the year 1875 and the latter at the May session in the year 1876, each for three years from the 4th day of July following his appointment, which terms were unexpired; and that each of the relators had entered upon and been in the exercise of said office, and that neither had resigned, or been removed from the same. The information then alleged that the defendants, Marcus E. Baldwin and Henry Whipple, had without authority and unlawfully taken possession of all the books and other property pertaining to said office and had usurped said office and without law or right had assumed to have the powers and discharge the duties of the same.

The defendants in their plea averred that the statute under which the relators had been appointed was repealed by the General Assembly at its January session in the year 1877, and the then existing office of county commissioner for New Haven County abolished; and that the General Assembly at the same session and by another section of the same act established the present office of commissioners for New Haven County, and appointed the defendants as two of the persons to hold said office, with one John W. Bassett who was at the time of said repeal a commissioner under the former law, and that they were fully entitled to said office, and had of right assumed to exercise its powers and perform its duties and had lawfully taken possession of the property pertaining to the same.

To this plea the Attorney for the State demurred, and the case was reserved upon the demurrer for the advice of this court.

The act, which was entitled "An Act relating to County Commissioners," is as follows:—

"Section 1. So much of section one, chapter two, title

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three, of the General Statutes of 1875, as provides that county commissioners shall be appointed for New Haven County, is hereby repealed, and the board of county commissioners of New Haven County is hereby abolished.

“*Section 2.* A board of commissioners for New Haven County is hereby created, to be appointed by the General Assembly, and said board shall perform in and for New Haven County all the duties and have all the powers provided by chapter two, title three, of the General Statutes, for county commissioners.

“*Section 3.* The General Assembly shall appoint three persons to be the board of commissioners for New Haven County, who shall hold their offices from the date of their appointment until July 1st, 1877.

“*Section 4.* The General Assembly shall appoint one commissioner for New Haven County, who shall hold his office for one year from July 1st, 1877, one commissioner who shall hold his office for two years from July 1st, 1877, and one commissioner who shall hold his office for three years from July 1st, 1877; and the General Assembly shall hereafter appoint annually one commissioner for New Haven County, who shall hold his office for three years from the next succeeding July 1st.

“*Section 5.* The Governor may fill any vacancy arising in the board of commissioners for New Haven County, during the recess of the General Assembly, until its next session.

“*Section 6.* This act shall take effect from its passage.”

G. H. Watrous and R. Hicks, in support of the demurrer.

1. The legislature in removing the relators usurped the powers of the judicial department of the government. It is admitted on the part of the defendants that the whole object of the action of the legislature was to remove from office the persons then in office as commissioners of New Haven County under the statute as it then stood, and whose terms had not expired. The journals of the two houses show that the act was passed upon a petition asking for the removal of these commissioners and upon the report of the committee thereon.

The legislature can remove the officer only by abolishing the office. Here they attempt to remove the officer without abolishing the office. The legislature has a right to repeal the law, as they are the judges whether a law is necessary, and if the law falls the office falls with it; but it is an absurd claim that, while the law never ceases to exist, the officer is dropped out by this trick in legislation. "The right to remove a public officer for misbehavior in office does not appertain to the executive; but such is a judicial act and belongs to a court." McCrary's Am. Law of Elections, §§ 255, 258. "Every proceeding to remove an officer for official misconduct or neglect is essentially and thoroughly a judicial proceeding, and has, consequently, and with the utmost propriety, been confided to that branch of the state government, nor in the frame of the state constitution is there wanting an organ appropriate to the exercise of this jurisdiction. I think the authority in question is vested in the court for the trial of impeachments." *State v. Pritchard*, 36 N. Jersey Law R., 101. "We do not doubt that every proceeding for the removal of an officer for cause, that is for official misbehavior, is essentially an exercise of the judicial power of the commonwealth, and would therefore refer itself to the judicial department of the government, if not otherwise disposed of by the constitution or the laws." *Page v. Hardin*, 8 B. Monr., 672.

2. An officer has a right to hold his office for the term of his appointment, provided the law under which he holds has not been repealed, or he has not been legally removed, and that right constitutes a species of property. That an office is a species of property has been repeatedly decided in this country. "The legal effect of the appointment was to give the office to the applicant, and he became entitled to it as a vested right, for the term of three years, from which he could be only removed in the manner prescribed by law, and of which the legislature had no power to deprive him." *Cotten v. Ellis*, 7 N. Car., 548. "There can be as little doubt that the act of declaring that the office involved in this case has been forfeited, was a judicial decision. It had all the essen-

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tial elements of such adjudication. It was a determination of the fact as well as the law, and comprised at once the functions of the jury and the judge, and it related to a right of property." *State v. Pritchard*, *supra*. "An office is as much a species of property as anything which is capable of being held or owned. An office being a species of property, it is evident that conflicting claims to the right to hold it must be decided in the same constitutional manner as all other claims respecting property." *Wammack v. Holloway*, 2 Ala. N. S., 34. "That an office is the subject of property thus explained, is well understood by every one, as well as distinctly stated from the earliest times in the law books. A public office is the subject of property as every other thing corporeal or incorporeal from which a person can earn a livelihood and make gain. We cannot doubt that in law an office is deemed the subject of property, and valuable property to the officer." *Hoke v. Henderson*, 4 Dev., 21. Unless the courts recognize a property in an office the legislature may at any time remove any incumbent and substitute another without any change of the law. No legislature since the adoption of our constitution has ever assumed such power. An office, like any other property, can be taken away only by one process of law. Due process means that charges shall be preferred, witnesses heard, and a judgment rendered. *Taylor v. Porter*, 4 Hill, 147. The constitutional mode for removing a public officer is by impeachment, and by that only. Constitution of Conn., art. 9, sec. 3; *State v. Pritchard*, *supra*; *State v. Wiltz*, 11 Louis. Ann. R., 441, 443. Any ingenious mode of evading the constitutional mode of removing a public officer will not be countenanced by the courts. "To do indirectly, in the abused exercise of an acknowledged power, not given for but perverted to that purpose, that which is expressly forbidden to be done directly, is a gross and wicked infraction of the constitution, and the more so because the means resorted to deprive the injured person, and are designed to deprive him of all redress, by preventing the question becoming the subject of judicial cognizance." Ruffin, C. J., in *Hoke v. Henderson*, 4 Dev., 27. "The legislature may create an

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office for the public good, or it may repeal the office for the general welfare. But so long as it lets the office exist, its incontestable judgment stands that it is for the public good, and the incumbent has a vested legal interest in the term, which the legislature cannot touch by any mere experimental legislation, however ingenious may be the pretext, or however much it may urge the popular demand." *Standeford v. Wingate*, 2 Duvall, 466.

3. But aside from any constitutional question, this act is wholly inoperative as a piece of ordinary legislation. It really means nothing. The first section repeals, and the second section restores. There is no time when the office of county commissioner ceased to exist. It is the same as if no law had been passed. It has been so decided in several similar cases. "In our judgment it is clear that the effect of this repeal and re-enactment was to continue the uninterrupted operation of the statute. There is no change in the law, and the re-enactment of the new is simultaneous with the repeal of the old provisions. It was said in the argument that there was an instant of time between the taking effect of the new statute and the expiration of the old, but it is difficult to perceive by what process such instant of time could be estimated. The new statute took effect at the same instant with the repealing statute. When the legislature re-enacted the same provision, and provided for its taking effect at the same time with the repealing of the old statute, it is clear that they intended to continue such provisions in force without interruption." *Fullerton v. Spring*, 3 Wis., 667. "The repeal of an act by virtue of which suits have been brought, and are pending at the time of the repeal, does not affect suits where the same act which makes the repeal contains a substantial re-enactment of the provisions under which the suits were brought." *McMullen v. Guest*, 6 Tex., 275.

J. W. Alling and H. Stoddard, contra.

1. The legislature had full power to legislate the relators out of office. 1 Dillon Mun. Corp., §§ 39, 168; Cooley's

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Const. Lim., 276; *Starr v. Pease*, 8 Conn., 547; *Pratt v. Allen*, 13 id., 119; *Taft v. Adams*, 3 Gray, 126; *Opinion of the Judges*, 117 Mass., 603; *Connor v. Mayor, &c. of New York*, 5 N. York, 296; *Butler v. Pennsylvania*, 10 How., 402; *Beebe v. Robinson*, 52 Ala., 66; *Ex parte Lambert*, id., 79; *Denver v. Hobart*, 10 Nev., 28; *County Commissioners v. Jones*, 18 Minn., 199; *State v. Douglass*, 26 Wis., 428; *Attorney General v. Squires*, 14 Cal., 12; *In re Bulger*, 45 id., 553. And the legislature of course had the power, having legislated the relators out of office, to appoint other suitable persons to act as commissioners of New Haven County, with all the powers incident to that office.

2. But the relators say that the defendants have not been clothed with all the powers of county commissioners for New Haven County, because their powers and duties are limited to those specified in "chapter two, title three," of the General Statutes, while other statutes give county commissioners other and important powers and duties. But does the reference to "chapter two, title three," of the General Statutes limit the powers and duties of the commissioners for New Haven County to such as are defined in that chapter and title? It is agreed on both sides that the legislature did not intend to deprive New Haven County of suitable and proper commissioners, to transact the business proper to be transacted by county commissioners. The powers and duties of county commissioners are too important to permit a suspicion that the legislature intended any such result. The General Assembly also in 1877 passed many acts relating to county commissioners, on the theory that that office existed uniformly throughout the state. The act further provides in sections three and four for commissioners for this county for periods of one, two and three years from July 1, 1877, showing that the legislature intended to enact a permanent law on this subject. Nothing in the act in terms limits the powers of the commissioners for New Haven County, to "chapter two, title three," of the General Statutes. This act does not say that the commissioners shall have only those powers. No reason can be imagined or conceived why the powers of the commis-

sioners should be confined to "chapter two, title three." So we do not put forward a construction that is hostile to the language of the statute. All other maxims of construction are subordinate, and yield to the leading principle that the intent of the legislature governs the construction of the language used in its acts. Where it is plainly perceivable that a particular intention, though not precisely expressed, must have been in the mind of the legislature, that intention will be carried out and made to control the strict letter, although such construction may seem contrary to the ordinary meaning of the letter of the statute. *Willimantic School Society v. Windham School Society*, 14 Conn., 467; *Bishop v. Vose*, 27 id., 9; *Staniels v. Raymond*, 4 Cush., 316; *Somerset v. Dighton*, 12 Mass., 383. The words "chapter second, title three," in the act in question, may therefore be safely regarded as inoperative, in pursuance of the well established maxim—" *Expressio eorum quae tacite insunt nihil operatur.*"

3. The argument that legislation which in one section should abolish an official board and in the next section should re-create the same official board is of no effect whatever and leaves the same membership in the board, whether sound or not, has no application to this case. The legislature did not merely re-create a board of commissioners for New Haven County, but went on to enact that the new commissioners were to be appointed by the General Assembly, and to provide for their appointment and to appoint them. It thus did not merely repeal the old law and re-enact a substitute, but, by proceeding under the law to appoint to the offices created by it, the legislature showed a clear intent to treat the new act as a substituted act and not as a mere renewal of the old one; and the whole question in any such case is, what did the legislature intend? Did it, by enacting a new law in the place of the old one, mean merely to keep the old law in force, or did it mean to have the substituted law the one in force. Their proceeding to make appointments under the new law shows clearly the latter intent.

GRANGER, J. The first question made in this case is,

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whether the act of March 22d, 1877, is constitutional. It is claimed by the relators that the act is unconstitutional and void, on the ground that the legislature in removing the relators assumed the powers of the judicial department of the state government. We think this claim is not well founded. It nowhere appears upon the record that the legislature assumed any judicial functions; no charges were preferred against the relators, so far as this record discloses, and no trial was had, and there was nothing upon which the legislature could have acted in a judicial capacity. The legislature acted only in the discharge of its legislative functions in passing the act under consideration. That it had the constitutional right to pass the act we think is beyond question, upon the principle that it is incident to the power of a legislature to repeal all prior laws, except those which are in the nature of grants.

The relators' counsel also claim that Birdsey and Lake had such a vested title to the office that they could not be removed; but we think they confess away this claim when they say in their brief that "the legislature has a right to repeal the law, as they are the judges whether a law is necessary, and if the law falls the office falls with it;" but they claim that the law under which the relators were appointed was not repealed by the act under consideration, and that the office of county commissioners for New Haven County was not thereby abolished. The counsel for the defendants claim the contrary, and say in their brief that "for some reason the legislature was dissatisfied with Lake and Birdsey as county commissioners for New Haven County, though their terms of office had not expired, and abolished the board of county commissioners as it stood March 22d, 1877; and that this action put an end to their official life." And again they say: "Having legislated Lake and Birdsey out of office, the General Assembly proceeded by public act and resolution to provide for the appointment of, and to appoint, other suitable persons to act as county commissioners for New Haven County, with all the powers incident to that office." If the law under which the relators were appointed was in fact repealed and the office

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actually abolished, then the relators could not successfully claim that they were county commissioners, for, as we have already seen, the legislature may repeal any law, with the exception before stated, passed by its predecessors, and may abolish any office created by legislative enactment.

But has the legislature by the passage of this act accomplished either of the above results? This is the vital question in the case, and to determine it we are to look at the act itself, in order to ascertain what effect is to be given to it. In the first place, in looking at this act, we observe that it is quite peculiar in its form, and we are confident that acts of this character are unusual in this state. We recall no instance where the legislature prior to this act has undertaken to legislate one board of officers out of office and another board in, before the expiration of the term of office, and we think there is no case in our own reports in which such an act has been brought to the attention of this court. The first section repeals "so much of section one, chapter two, title three, of the General Statutes of 1875, as provides that county commissioners shall be appointed for New Haven County," and abolishes the board of county commissioners for New Haven County. The second section creates a board of commissioners, the language of this section being, "A board of commissioners for New Haven County is *hereby created*, to be appointed by the General Assembly, and said board shall have all the powers and perform all the duties provided by chapter two, title three, of the General Statutes for county commissioners." In regard to the last clause of the second section, neither party claims that the powers and duties of the defendants were intended to be limited to those powers and duties specified in the section referred to in the General Statutes. The relators allege that the respondents have assumed *all* the duties of county commissioners, that they have taken possession of the office, property, books, &c., of the county, and the respondents in their plea allege and admit in substance the same, and claim a right to do so under the act in question. Have these words then in this second section, "said board shall have all the powers and perform all the

duties provided by chapter two, title three, of the General Statutes for county commissioners," no significance and no meaning? It would seem that they must have been used for some purpose, and we think the purpose was to revive the force of the statute, section 1, chapter two, title three, so far as it related to commissioners for New Haven County.

We have then this condition of things—an act of the legislature repeals by its terms a certain section of the General Statutes and abolishes a board of officers appointed under it, and the same act creates precisely the same board and clothes them with the same powers and duties enumerated in the section repealed. Can this be done? We think not. The act in question contains the elements of its own destruction. It attempts to kill and make alive at the same instant, an impossibility. There must be some appreciable space of time between the repealing act and the re-enactment of the same act. In this case not a second intervened, and there was never a moment when the relators were out of office, or when the office of county commissioners for New Haven County was abolished.

For these reasons we advise the Superior Court to render judgment for the State.

In this opinion the other judges concurred.

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WILLIAM J. ATWATER vs. LORENZO TUPPER.

A judgment in trover, without satisfaction, does not pass the title of the property to the defendant.

The plaintiff brought two actions of trover at the same time against *A* and *B* who had severally converted the same property, the conversion by *B* being after that by *A*. He obtained judgment against *A*, when *B* pleaded that fact in bar of the further maintenance of the action, the judgment not having been satisfied. Held to be no bar.

And held that the judgment was to be for the full value of the property.

The value of the property had been found upon a hearing on the general issue before the filing of the plea in bar of the further maintenance of the action.

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The plaintiff demurred to that plea and the court sustained the demurrer. The defendant then claimed the right to be heard upon the question of damages. Held that, as the value of the property had been already found, and was the rule of damages, the defendant was not entitled to a further hearing on the subject.

TROVER; brought to the Superior Court in New Haven County.

The plaintiff brought at the same time with the present suit, and to the same court, another action of trover for the same articles against one Muldis Miller. Both cases were referred together to the same committee, who found the facts, and made a report in each case, the conversion of the property by the defendant in each case being found, the conversion by the said Miller preceding that by the defendant in the present action, and the value of the property being found to be \$2,500. The plaintiff having obtained judgment in the other action the defendant in this action pleaded that fact against the further maintenance of the action. To this plea the plaintiff demurred, and the court (*Hovey, J.*) sustained the demurrer. The defendant then moved to be heard in damages, which the court refused, and rendered judgment against him for the value of the property, with interest from the time of the conversion.

The defendant brought the record before this court by a motion in error. He also moved for a new trial for error of the court in refusing him a hearing in damages.

G. H. Watrous and *C. W. Gillette*, for the plaintiff in error.

1. The claim that a judgment against one tort-feasor is not a bar to an action against another, whether true or not in a given case, has no application to the case under consideration. If it be correct, (and the doctrine if adopted has been established against the dissent of able judges,) it has been applied only to cases of joint tort-feasors, and not to cases like the present. The conversion of the goods by Miller was his sole act. The defendant had no relation to the goods at the time of their conversion by Miller, nor for months after.

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wards. If they were joint converters of the property and had been jointly sued, and judgment obtained against them jointly, such judgment would have vested the title to the property in them jointly, from the moment of conversion. If they were joint converters of the property, and had been severally sued, then the claim of the plaintiff might, upon the doctrine of some recent decisions, be urged with greater force. The property was converted by Miller long before it is claimed that the defendant knew of it or had anything whatever to do with it. The title to the property was vested in Miller, by virtue of the judgment against him, by relation from the moment of conversion. *Adams v. Broughton*, Andrews, 18; *Buckland v. Johnson*, 6 J. Scott, 145; 1 Waterman on Trespass, 601, *note*. The title to the property having vested in Miller from the moment of conversion by the act of the plaintiff in suing him in trover and pursuing the suit to final judgment, the plaintiff cannot successfully claim that the defendant shall answer to him in damages for the conversion of the property.

2. If the plaintiff were entitled to a judgment at all, it should have been for nominal damages only. *Ayer v. Ashmead*, 81 Conn., 447.

3. Upon the sustaining of the plaintiff's demurrer the defendant should have been allowed a hearing in damages. *Havens v. Hartford & N. Haven R. R. Co.*, 28 Conn., 69; *McAlister v. Clark*, 33 *id.*, 91; *Lamphear v. Buckingham*, *id.*, 237; *Carey v. Day*, *id.*, 152; *Rose v. Gallup*, *id.*, 338.

W. C. Case and *C. S. Hamilton*, for the defendant in error.

CARPENTER, J. The plaintiff brought two actions of trover, one against the defendant and the other against one Miller, to recover the value of the property described in the declaration. Both causes were referred to the same committee and tried at the same time. The committee reported in both cases and the plaintiff obtained judgment against Miller. Thereupon the defendant pleaded that judgment in bar of this suit. That plea was demurred to and the demurrer sustained by the

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Superior Court, and judgment rendered for the plaintiff to recover the value of the property, with interest and costs.

The defendant filed a motion in error—also a motion for a new trial.

On the motion in error the question arising is this—Is a judgment, without satisfaction, in an action of trover against one, a bar to an action of trover against another, for a subsequent conversion of the same property? Whatever the law may be elsewhere, it is clear by the decisions in this state, that a mere judgment against one of two joint wrong-doers is not a bar to a suit against the other. That point was directly decided in *Sheldon v. Kibbe*, 3 Conn., 214, where the question was ably discussed, and the English and American cases bearing upon the subject were noticed and considered. It was also considered upon principle and the conclusion reached, (CHAPMAN, J., dissenting,) that it was not a bar. The argument in support of the decision in that case is sound and satisfactory to us. We deem it unnecessary to repeat it or to supplement it with any reasoning of our own. In *Ayer v. Ashmead*, 31 Conn., 447, the question decided was somewhat different; but the opinion of the court given by HINMAN, C. J., and the dissenting opinion by BUTLER, J., assume the law to be as stated in *Sheldon v. Kibbe*. Judge HINMAN says, in speaking of joint trespassers, “if suits are separately brought against each, they may all be pursued to final judgment, and the plaintiff may elect which of the separate judgments he will enforce and collect.”

But the defendant insists that by operation of law the judgment against Miller divested the plaintiff of his title and vested it in Miller; and that such change of title by relation took effect when Miller converted the property to his own use; and that therefore, as the conversion by Miller was antecedent to the conversion by the defendant, the plaintiff at that time had no title. This argument may be ingenious but it is not sound. There is no substantial reason for holding that the change of title, whenever it occurs, takes effect by relation at the time of the conversion. The only reason that occurs to us is that the plaintiff recovers interest from the time of

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conversion. But that argument fails when we consider, as we may, that the interest is an equivalent for the use of the property in the meantime.

But we have no occasion to discuss this point, as we are satisfied that the better rule is that the title changes when the judgment is satisfied. The change of title is by operation of law; and the law will not deprive one of his property without his consent until he receives compensation. The law gives him a remedy against all the wrong-doers; that remedy will be greatly impaired if, when he recovers judgment against one, he thereby loses his claim against all others. The operation of such a principle would be to compel him to bring a joint action when that can be done, and to deprive him of such advantages as there may be in bringing separate suits. In cases like this, where the wrongful acts are done at different times, he must elect which to sue and forego his remedy against the others. In effect this is so, because, although he may sue all, yet he gains nothing by it, as in the end he must make his election and take judgment only against one. This ought not to be so, and therefore we say that it is not so.

The weight of authority also is decidedly against the defendant on this point. In Swift's Digest, Vol. 1, p. 539, it is stated thus:—"When a person has been subjected to pay the value of a chattel in this action he becomes thereby vested with the ownership of it." In 1 Greenleaf on Evidence, § 533, it is stated that the weight of authority seems in favor of the opinion that it is the satisfaction of the judgment, and not the judgment itself, which changes the title. Many cases are cited in a note to that section and the same conclusion is reached.

The motion for a new trial presents one question only. After the demurrer to the defendant's plea in bar was sustained, the defendant claimed the right to be heard on the question of damages. The court decided otherwise, and rendered judgment for the value of the property. We think this ruling was right. This is not the ordinary case of a demurrer to the declaration overruled. In such cases, unless the declaration shows that a definite sum only can be recov-

ered, as in actions for a fixed penalty, there must be an inquest to ascertain the amount of damages. In actions sounding in damages the plaintiff will recover only a nominal sum, unless the proof shows that further damages have been actually sustained. In all such cases the defendant will be heard as a matter of course. The cases cited by the defendant are of this description. This case is different. Under the general issue the defendant was fully heard on the question of damages, and they have been judicially ascertained. So far therefore there is no occasion for a further hearing. But as we understand the defendant's claim, he goes further, and insists that in view of the prior judgment against Miller, which fact is brought upon the record by the plea in bar, the plaintiff is only entitled to nominal damages. This claim assumes that the plaintiff is entitled to only one judgment for full damages. That assumption however is not well founded, as we have endeavored to show.

The defendant cites *Ayer v. Ashmead*, 31 Conn., 447. That case is not analogous. There satisfaction was received from one trespasser and it was held that it was a discharge of a co-trespasser. In this case if the judgment against Miller had been *satisfied* there would be merit in the defendant's claim. As it is the question hinges on the question already considered on the motion in error, which, as we have seen, is against the defendant, and shows that the plaintiff is entitled to a judgment for full damages.

A new trial must be denied.

In this opinion the other judges concurred.

MILES L. CLARK vs. GEORGE K. WHITING.

The defendant, a holder of a negotiable note payable in five years from date with interest, endorsed by the payee in blank, delivered it before maturity to the plaintiff, with his name endorsed on it under that of the payee, but with the following words in his own writing above his name:—"Rec'd one year's

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interest on the within. May 10, 1871." Held that the whole entry taken together imported merely the acknowledgment of the payment of interest on the note, and that if the plaintiff would show that the defendant had made himself an endorser of the note by his signature, he must show by evidence *aliunde* that the signature had no connection with the words written above it.

ASSUMPSIT against the defendant as endorser of a promissory note; brought to the Superior Court in New Haven County, and tried to the court, upon the general issue, before *Hovey, J.*

The note was for \$1,000, dated May 10th, 1870, payable to the order of Hervey B. Leete in five years after date with interest, and was endorsed in blank by the payee. It appeared that the payee had delivered the note thus endorsed to the defendant, and that the defendant had delivered it to one Russell, and Russell to the plaintiff, all before the maturity of the note, and that the note was dishonored by the maker when due and notice given to Leete the first endorser and to the defendant. It further appeared that the name of the defendant was written by him below that of Leete, and in a proper place for an endorsement of the note, but that above his name was written in his own hand the following: "Rec'd one year's interest on the within, May 10th, 1871;" and that the note with this entry upon it was delivered by the defendant to Russell.

The defendant offered parol evidence to prove that, in writing his name on the back of the note, he did not intend to render himself liable as an indorser of the note, but that his sole intent in doing so was to acknowledge the receipt of interest on the note, which had been paid to him by the maker. To this evidence the plaintiff objected and the court excluded it.

The defendant further offered evidence to prove that, when he delivered the note to Russell, the latter requested him to endorse it, and that he refused to do so. To this evidence the plaintiff objected and the court excluded it.

The court having rendered judgment for the plaintiff the defendant moved for a new trial.

L. E. Munson, in support of the motion.

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1. The alleged indorsement is not a contract of indorsement, but is a plainly expressed receipt for interest paid upon the note. It interprets itself, and should have the same legal effect as though written upon a separate piece of paper attached to the note. It does not even constitute *prima facie* an endorsement, and the burden of proof was really on the plaintiff to show that it was so and not on the defendant to show that it was not.

2. The defendant offered to prove by parol that his signature was put there at the time of and in connection with the payment of interest upon the note, as an acknowledgment of such payment, and for no other purpose whatever. If that evidence had been received, and found true, then there was no contract of indorsement. The circumstances may be inquired into in such a case, and parol evidence is admissible for such purpose. 1 Swift Dig., 182; 1 Greenl. Ev., § 287; *Perkins v. Catlin*, 11 Conn., 213; *Case v. Spaulding*, 24 id., 578; *Downer v. Chesebrough*, 36 id., 39; *Monson v. Drakely*, 40 id., 552.

H. D. Russell, contra.

The law will not permit the contract of indorsement to be explained in a suit between immediate or remote parties without knowledge of any facts raising an equity between them. *Dale v. Gear*, 33 Conn., 15; *S. C.*, 39 id., 89, and authorities there cited. The offer of the excluded evidence was an attempt to avoid the liability of an indorser by connecting with his indorsement extraneous matter in no way qualifying it, and having no relation to it except mere position. This juxtaposition of the two indorsements may have been accidental, or intentional and fraudulent.

PARK, C. J. The note in question was endorsed in blank by Leete, the payee, and delivered to the defendant in the usual course of a commercial transaction. Under the indorsement of Leete upon the back of the note, the following words appear, over, and in immediate connection with, the signature of the defendant:—"Received one year's interest

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on the within, May 10th, 1871. G. K. Whiting." Does the note purport to have been indorsed by Whiting in the legal sense of that term? We think not. If the defendant had written the words "without recourse," over and in immediate connection with his signature before delivering the note, no one would claim that he had made a contract of indorsement. The reason is that his signature would be taken in connection with the words preceding it. These words would qualify or explain it. Suppose the defendant had written upon the back of the note a memorandum of some contract he had made with a third person, and the parties to the contract had signed the memorandum; could this make them liable as endorsers of the note if it should afterwards be further negotiated? Disconnect the signatures from the rest of the writing and they would be endorsements. So disconnect the signature from the words "without recourse," in the case supposed, and the defendant would be liable as an indorser of the note; but if his signature is taken with the words he would not be liable.

We think it is clear the entry in question of itself purports merely the acknowledgment of a receipt by the defendant of a sum of money as interest on the note, and in order to make the defendant liable as an indorser the plaintiff must prove by evidence *aliunde* that the defendant's signature had no connection with the receipt. This is the apparent construction of the entry upon the back of the note; and the plaintiff must have so understood it when he received the note. Indeed, during the time the plaintiff has held the note he has receipted in similar language, and in a similar way, a sum of money he had received as interest on it. This shows clearly how he must have regarded the entry in question at the time he made this entry of his own.

The motion states that the plaintiff proved that the defendant indorsed and delivered the note. If this was intended to mean that the plaintiff proved the facts by evidence *aliunde*, then the court erred in rejecting the evidence offered by the defendant to show that he did not indorse the note, but merely receipted a sum of money which had been paid as interest on the note. If by it the court intended it to be understood that

the plaintiff proved the fact of indorsement by the note itself, then the court erred in giving a wrong construction to the entry in question; and in either case there should be a new trial.

In this opinion the other judges concurred.

45	153
59	136

JOHN SCHINDLER vs. JOSEPH B. MUHLHEISER.

The defendant had given the plaintiff his note for certain real estate conveyed to him by an absolute deed by the plaintiff. Held, in a suit on the note, that parol evidence was admissible, on the part of the defendant, to show that the conveyance was not intended as a sale, but was made by the plaintiff for a certain purpose of his own, and upon an understanding with the defendant that the land was afterwards to be conveyed back, and that the note was given at the time under an agreement that it was not to be paid.

ASSUMPSIT on a note executed by the defendant to the plaintiff; brought to the Superior Court in New Haven County. Facts found and case reserved for advice. The case is sufficiently stated in the opinion.

J. W. Alling and *L. N. Blydenburgh*, for the plaintiff.

T. E. Doolittle and *H. Stoddard*, for the defendant.

CARPENTER, J. Prior to December 21st, 1874, the plaintiff and one Gilch were the owners, as tenants in common, of certain real estate, subject to a mortgage. The plaintiff not being able to make a satisfactory arrangement with Gilch, agreed by parol with the defendant that his interest in the land should be deeded to the defendant, that the defendant should execute and deliver to the plaintiff his note for one thousand dollars, that thereupon the defendant should negotiate with Gilch as owner, and that afterwards the land should be re-conveyed to the plaintiff, and that the plaintiff should deliver up to the defendant his note. It is further found that

Schindler v. Muhlheiser.

there was no other consideration for the note, and that it was not intended by either party that the note should be paid.

Three things are noticeable from this statement:—1st. The note was given pursuant to, and in fulfilment of, an antecedent agreement between the parties. 2d. That agreement shows that it was not given as evidence of any existing indebtedness, but as a means of accomplishing an ulterior object, wholly in the interest and for the benefit of the plaintiff. 3d. Consequently the note was an accommodation note, the collection of which would operate as a fraud upon the defendant.

The plaintiff invokes the aid of the familiar rule of law that parol evidence is not admissible to contradict or vary a written instrument. That rule has no application to a case like this. It has for its object the prevention of fraud and perjury in those cases where parties have put their contract in writing, by excluding any other evidence of the terms of the contract than the writing itself. But that is not this case. The contract was not reduced to writing. It was a parol agreement, and provided for the use of the note in suit, and also of the deed, for a special purpose; that is, that both instruments should be used in aid of the negotiations with Gilch. So far the contract has been performed; but this is not all of it. A further provision in it was that the defendant should re-convey the land to the plaintiff and the plaintiff should give up to the defendant his note. This part the plaintiff refuses to perform. He insists that the defendant, contrary to the intention and understanding of both parties, shall retain the land and pay the note. That makes the transaction simply a sale of real estate when there was no sale in fact. It compels the defendant against his will to become the purchaser of this land. Instead of preventing fraud, such an application of the rule would perpetrate a fraud of the grossest character, and bring reproach upon the law and the administration of justice. It would be unfortunate indeed if such a salutary rule of law could be perverted so as to apply to a case like this. This court has repeatedly decided in similar cases that it cannot be done. *Brush v. Scribner*,

Coe v. City of Meriden.

11 Conn., 388; *Case v. Spaulding*, 24 Conn., 578; *Daggett v. Whiting*, 35 Conn., 366; *Downer v. Chesebrough*, 36 Conn., 39; *Dale v. Gear*, 39 Conn., 89.

We advise the Superior Court that parol evidence was admissible to prove the real contract between the parties, and that judgment should be rendered for the defendant.

In this opinion the other judges concurred.

45	155
96	271
66	486

RUSSELL COE vs. CITY OF MERIDEN.

The charter of the city of Meriden provides that all appeals from appraisals of damage and assessments for benefits in laying out any highway or public improvement in the city, shall be taken to the Superior Court in New Haven County. A general statute, passed since the charter was granted, provides that such appeals in any city (except Bridgeport) may be taken to any judge of the Superior Court. Held that this act applies to the city of Meriden, and that an appeal taken under it in that city was valid.

APPEAL from an appraisal of damages in the laying out of an alteration in a public street of the city of Meriden; taken to Judge *Sanford* of the Superior Court. After a judgment in the case in favor of the appellant, the city of Meriden filed a motion in error, assigning as error the want of jurisdiction on the part of the judge. The case is sufficiently stated in the opinion.

R. Hicks, for the plaintiff in error.

O. H. Platt, for the defendant in error.

PARK, C. J. The appeal in this case was taken under the statute found on the 91st page of the Revision of 1875, which is as follows: "Any person aggrieved by the appraisal of damages in laying out any highway, or in making any improvement or public work in any city (except Bridgeport) or borough, or by the assessments of benefits therefor, may

appeal from such appraisal or assessment to any judge of the Superior Court, within thirty days after public notice shall be given of such appraisal or assessment," &c.

It appears in the case that at the time this statute was passed the charter of the city of Meriden provided that appeals of the character of the present one should be taken to the Superior Court in the county of New Haven; and it is claimed that the charter, having been made with particular reference to the city of Meriden, was not repealed or modified in respect to such appeals by the statute in question, on the principle that particular statutes are not repealed by subsequent general statutes unless so expressed in definite terms, but are to be regarded as excepted from their operation. The reason of the rule is, that where the attention of the legislature has been called to a particular subject, and a special provision has been made regarding it, it can not be supposed that they intended to repeal it, when subsequently enacting a general statute in relation to the same subject. It is reasonable to presume that the special provision was not in the mind of the legislature when the general enactment was passed, and that therefore no express exception was made.

But the principle does not apply to the statute in question, for the obvious reason that it is definite and particular, in fact as much so as the charter itself. In the first place, the statute applies only to the cities and boroughs of the state, and the present question relates only to that part of it which applies to the cities. Here the language is, "Any person, * * in any city * * except Bridgeport * * may appeal," &c. Suppose all the cities of the state except Bridgeport had been named in the statute, would it have been in fact more definite than it is? The exception made, out of the small number of the cities, shows clearly that the attention of the legislature was called to each particular city, and each was considered before the statute was enacted; and hence the singular number was used—"in any city." And inasmuch as the statute was not intended to apply to all the cities of the state, it became necessary to adopt one of two courses in drafting it. One was, to name all the cities to which the

 McDonald v. Holmes.

statute was intended to apply, and the other to name those to which it was not intended to apply. Obviously the latter course was adopted for the sake of brevity merely, inasmuch as but one exception was intended to be made.

Furthermore, at the time this statute was passed all the cities of the state had special provisions in their charters regarding appeals of a like character to the present one. The claim made would exempt every one of them from the provisions of the statute; and this absurdity would follow, that a statute which was made in positive terms to apply to every city in the state except Bridgeport, does not apply to one of them, because the charter of each had a special provision regarding appeals at the time the statute was enacted.

In further support of the view we have taken, we might refer to the principle, well established in the construction of statutes, that when a statute makes an exception from its provisions, it is to be presumed that all the exceptions were made which were intended.

We think the appeal in this case was well taken, and that there is no error in the judgment complained of.

In this opinion the other judges concurred.



45	157
68	548
45	157
68	9

THOMAS McDONALD vs. SANFORD H. HOLMES.

Replevin can not be maintained against an officer for property attached by him ✓
 It should be brought against the attaching creditor. ✓

REPLEVIN for property attached; brought to the City Court of the city of New Haven, and tried to the court on the general issue and a special plea in bar, before *Peck, J.* Facts found and judgment rendered for the plaintiff, and motion in error by the defendant. The case is sufficiently stated in the opinion.

M. W. Seymour and *A. B. Beers*, for the plaintiff in error.

McDonald v. Holmes.

C. T. Driscoll, for the defendant in error.

CARPENTER, J. This is an action of replevin. The defendant is a constable of the town of New Haven, and attached and held the property only by virtue of a writ of attachment against Edward McDonald. The plea in bar sets up this fact as a defense. The court below held that it was not a defense and rendered judgment for the plaintiff. The case comes before this court by a motion in error.

The only question we need to consider is, whether an action of replevin can be maintained against an officer for property attached by him.

We think it cannot. The action of replevin is regulated wholly by statute. Previous to the last revision it was well settled that this action could not be maintained against an officer. *Bowen v. Hutchins*, 18 Conn., 550; *Hathaway v. St. John*, 20 Conn., 348. The reasons given for those decisions are applicable under our present statute. The statute now authorizes an action of replevin in favor of any party to recover goods and chattels "which are wrongfully detained from him in any manner." Gen. Statutes, p. 484, sec. 1. There is nothing in this section expressly authorizing a suit against an officer. As the law previously stood replevin could be maintained in three classes of cases—for cattle impounded, property attached, and property otherwise unlawfully detained; and the law authorizing it was found in three distinct sections. In the revision these three sections are in one, embracing all cases. We see in this no intention to change the law so as to allow replevin against parties not before liable. On the contrary the language of the act is fully satisfied by limiting the plaintiff to an action against the attaching creditor as before.

The plaintiff attempts to draw an argument from the language of the forms prescribed by statute. The argument from this source is not very forcible. It was not designed that the forms given should be literally followed. The language of the statute is that the writ and declaration, the affidavit, and the recognizance, "may be in the form following."

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The intention manifestly was that the form might be varied and adapted to the circumstances of each particular case. If we consider the attaching creditor as the real wrong-doer, and the officer as merely his agent or servant, there is no difficulty in adapting the language of the forms to a suit against the attaching creditor alone. That would be a substantial compliance with the statute, and that is all that is required.

The judgment is erroneous and must be reversed.

In this opinion the other judges concurred.

FRANCES H. BUTLER vs. THEODORE BLACKMAN AND OTHERS.

A mortgage may be foreclosed for interest overdue on the mortgage note, where the principal of the note is not yet due.

PETITION for foreclosure; brought to the Superior Court in New Haven County, and heard before *Hovey, J.* Decree for petitioner and motion in error by respondents. The case is fully stated in the opinion.

W. F. Taylor, for plaintiffs in error.

C. Ives and *C. H. Fowler*, for defendant in error.

PARDEE, J. On the 31st day of March, 1871, the respondents executed and delivered to the petitioner several promissory notes; of these, one was for \$1,000, payable May 1st, 1874, another for \$500, payable November 1st, 1874, and a third for \$3,500, payable May 1st, 1878, all with semi-annual interest; and the payment of principal and interest was secured by a mortgage. Upon this petition for a foreclosure the court found that on the 14th day of May, 1877, there was an aggregate of principal and interest due of \$2,010; being \$1,620 upon the first two notes, and \$390 interest from Jan-

Butler v. Blackman.

uary 14th, 1876, to January 14th, 1877, upon the last note, the principal of which is not yet due. The court decreed that the respondents be foreclosed unless they pay the said sum of \$2,010. They object, for the reason that the last named item of interest is included.

There is no error in the decree. The respondents promised to pay the interest semi-annually; this is a lawful contract; their mortgage deed recognizes it, and contains their covenant that a decree of foreclosure may be passed against them if they fail to perform it. The overdue interest is of the substance of the debt equally with an overdue installment of the principal; the failure to pay the one stands upon the same footing as the failure to pay the other; the claim for the interest over due will support either a judgment at law or a decree in equity. The petitioners would have been entitled to a decree based solely upon this item of overdue interest; of course there can be no objection to a decree adding it to overdue principal; the payment of it is of the essence of the contract as much as the payment of the principal, for by the terms of the note the interest earned becomes a debt as fully as if separate notes had been given for it, one of which was made payable at the end of every period of six months. The decree is not inequitable; it does not increase the burthen which the respondents voluntarily took upon themselves.

There is no error.

In this opinion the other judges concurred.

SUPREME COURT OF ERRORS.

COUNTIES OF NEW LONDON AND WINDHAM.

SEPTEMBER TERM, 1877.

Present,

PARK, C. J., CARPENTER, PARDEE AND GRANGER, JS.

45 161
63 456

LOREN BOSWORTH vs. HENRY TROWBRIDGE.

The statute (Gen. Statutes, tit. 16, ch. 10, sec. 2,) provides that when the selectmen of a town shall establish a *new pound*, they shall appoint a pound-keeper for it, to hold office until the next annual meeting; another statute providing for the appointment of pound-keepers by towns at their annual meetings. The defendant had been appointed by the town as its pound-keeper for a certain pound. The pound having been damaged, so that it could not be used, the selectmen made another about fifty rods distant. Held not to be a new pound within the meaning of the statute, and that the defendant became keeper of the pound under his previous appointment.

And held that it made no difference that the old pound had been repaired and was in a condition to be used.

The new pound contemplated by the statute is a pound established by the selectmen in some part of the town where there was none before, and where no pound-keeper had been appointed at the last annual meeting.

In replevin by the owner of cattle held by the defendant as pound-keeper in the new pound, the court below found in detail certain facts with regard to the establishment of the new pound and the detention by the defendant of the cattle therein, and concluded the finding as follows: "The court finds that said cattle were unlawfully detained by the defendant and that the plaintiff was entitled to the immediate possession of the same." Held to be a conclusion of law from the facts stated, which could be reviewed by this court on a motion in error.

REPLEVIN to recover possession of cattle impounded; brought to the Superior Court in Windham County, and tried to the court on the general issue, with notice, before *Culver, J.* The court made the following finding of facts:—

On the 17th day of June, 1876, the defendant was the lawful pound-keeper of a lawful pound in the town of Eastford;

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as such pound-keeper he received into the pound nine cattle, being the property of the plaintiff, having been lawfully brought there by two haywards of the town, who took them from the highway where they were found running at large, having escaped from the plaintiff's enclosure without his knowledge. The cattle were lawfully kept in the pound by the defendant and by him properly cared for until some time during the night of the 22d of June, when by means of some human agency, without the knowledge of the defendant, and without any agency of the plaintiff, direct or indirect, and without his consent, they escaped from the pound into the plaintiff's enclosure. The poundage fees and expense of keeping the cattle were not paid to the defendant nor tendered to him.

The plaintiff was notified of the impounding within twenty-four hours by the haywards; also within an hour after the cattle had escaped the defendant notified the plaintiff that they had been wrongfully let out of the pound.

The cattle were suffered to remain by the plaintiff in his enclosure until the 24th of June, when the defendant by a writ of replevin caused them to be taken out and placed in a new pound which the selectmen of the town caused to be established on that day in the town. The defendant kept them in the new pound until the 10th day of July, 1876, assuming to do so as pound-keeper, but the court finds that he had never been appointed pound-keeper of the new pound, nor had any person been appointed keeper of it; and the defendant claimed the right to hold the cattle in the new pound by the direction of one of the selectmen. The new pound was distant from the old pound about six hundred and fifty feet. The old pound still remained a lawful pound, but when the cattle were let out the gate, hinges and lock belonging thereto were broken, but could have been repaired, and in fact were repaired, in about three hours at a trifling cost.

The plaintiff on the 10th day of July caused the cattle to be replevied, without paying or offering to pay the defendant's poundage fees and expenses for keeping them in the old pound up to the time of their escape, or the expense claimed by the

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defendant for keeping them in the new pound, the whole amounting, as claimed by the defendant, to \$29.50.

The court finds that the cattle at the time the plaintiff replevied them were unlawfully detained by the defendant, and that the plaintiff was entitled to the immediate possession of the same; and therefore finds the issue in favor of the plaintiff, and that he recover of the defendant one dollar damages and costs.

The defendant brought the case before this court by a motion in error.

G. W. Phillips and *H. Johnson*, for the plaintiff in error.

J. J. Penrose, for the defendant in error.

CARPENTER, J. The plaintiff's cattle were lawfully impounded on the 17th day of June, 1876. During the night of June 21st they were forcibly and unlawfully taken from the pound, and the pound was thereby rendered unfit for present use. The selectmen thereupon established what the finding denominates a "new pound," but which was manifestly a mere substitute for the old one. On the 24th of June the defendant, who was the pound-keeper of the old pound, regained the possession of the cattle, and put them in the newly-established pound, where they were kept until July 10th, when the plaintiff took them by virtue of the writ in this suit, without paying poundage fees or other charges.

Neither the defendant nor any other person was specially appointed pound-keeper of the new pound.

The plaintiff made no claim that the cattle were wrongfully impounded in the first instance, but he did claim that they were unlawfully detained in the new pound, for the reason that the defendant was not the lawful keeper of that pound; and this claim was sustained by the Superior Court.

This claim is purely technical, and if sustained by this court it must be sustained at the expense of justice. The court below found that the cattle "were unlawfully detained by the defendant and that the plaintiff was entitled to the

immediate possession of the same." That is a conclusion of law. If the facts stated do not warrant the conclusion the judgment is clearly erroneous. That conclusion rests entirely upon the assumption that the defendant could not lawfully detain the cattle in the new pound, inasmuch as he was not specially appointed keeper of that pound.

The defendant was duly elected a pound-keeper of the town. The place where the cattle were kept was legally established by the selectmen *as a pound*. Therefore the defendant was a lawful pound-keeper and kept the cattle in a lawful pound, and in doing so did not interfere with the official rights and duties of any other person. The precise objection is that the link connecting the lawful pound with a lawful pound-keeper was wanting—that the selectmen did not follow the statute literally and make a formal appointment.

By statute (Gen. Statutes, p. 24, sec. 1,) each town at its annual town meeting is required to elect "a pound-keeper for each pound." On page 254, sec. 1, it is provided that "the selectmen of every town shall erect and maintain a sufficient pound or pounds for the impounding therein of all creatures liable by law to be impounded." The second section is as follows:—"When the selectmen shall establish a new pound, they shall appoint a pound-keeper for it, to hold office until the next annual town meeting."

These statutes were intended for the guidance of plain practical men—men not learned in the law, and not familiar with its technicalities. They are expressed in the most general terms, intentionally leaving much to the discretion and judgment of the men who are to administer them. A substantial compliance with the statutes, following their spirit and accomplishing their object, even though there be not a rigid adherence to the letter, is all that is required. If it can be done consistently with the rules of law they should be so construed as to protect the men who are charged with their execution, and that construction which makes them a trap and a snare in the hands of designing men should be avoided. Bearing in mind these suggestions let us examine the terms of the statutes.

It will be noticed that pound-keepers appointed by the selectmen hold their offices temporarily—"until the next annual town meeting." Preference is manifestly given to officers elected by the people. It follows logically from this suggestion, as well as from the general scope and object of the statute, that they should only be appointed by the selectmen when there is a necessity for it. The new pound contemplated by the second section, cited above, is a pound in some part of the town where there was none before, and where no pound-keeper was elected at the last annual town meeting. In such cases, if the pound is to be used before the next annual meeting there is a necessity for an appointment by the selectmen.

If a new pound is established to take the place of one already existing, no matter for what cause, and no matter whether temporarily or permanently, the keeper of the old pound elected by the people may lawfully keep such new pound, and there is no necessity for the appointment of another. Suppose for illustration a pound should be found insufficient for want of capacity, and the selectmen should establish an additional pound. Can there be any doubt that the keeper of the old pound might lawfully keep the new? Suppose again a pound should be destroyed by fire, and the selectmen should establish a new one as a substitute therefor. In such a case what necessity is there for a new appointment? The case before us does not differ in principle from the one supposed. The old pound was temporarily unfit for use. One was needed immediately. The selectmen were to determine what should be done. Instead of repairing they established another pound but a few rods distant. For the time being there was but one pound. It is not for the courts to say whether they acted wisely or unwisely, judiciously or otherwise. Their action in the premises, so long as they acted within the scope of their powers, cannot be reviewed or called in question. The sufficiency or insufficiency of the old pound and the necessity for a new one were questions to be determined solely by the selectmen. The fact therefore that the slight damage was subsequently repaired, so that there were

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in fact two separate enclosures used as one pound, is immaterial. If two such enclosures are needed in the same locality, or if from any cause the selectmen establish two, whether needed or not, we see no legal objection to placing them both in charge of one pound-keeper. So that, whether the old pound was or was not repaired at the time the plaintiff replevied the cattle, or, in other words, whether one or two enclosures actually existed at that time, can make no difference with the result. In any event there was nothing in the conduct of the defendant that was positively wrong, nothing that contravened the statute or public policy, and nothing which occasioned the slightest injury to the plaintiff.

Under the circumstances we think that the new pound, as it is called, must be regarded as a substitute for the old one, or, after the old one was repaired, as an addition thereto and a part thereof; and that the defendant was the lawful keeper thereof without an additional appointment.

In holding otherwise we think the court below erred. A new trial must be advised.

In this opinion the other judges concurred.

HENRY TROWBRIDGE vs. LOREN BOSWORTH.

The plaintiff was pound-keeper and held the cattle of the defendant in the pound. While so held they were let out by some person unknown, without complicity on the part of the defendant, and returned to the defendant's enclosure. The plaintiff sent notice to the defendant that the cattle had been illegally returned to his enclosure but did not demand them or go for them. The cattle not being returned to the pound the plaintiff brought replevin for them. Held that the defendant was not in the position of a wrong-doer, and was not liable to the action until demand had been made upon him and he had refused to give up the cattle or to allow the plaintiff to enter his enclosure and take them.

REPLEVIN for cattle claimed to be unlawfully detained; brought to the Superior Court in Windham County, and tried

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to the court on the general issue before *Culver, J.* The court made a special finding of the facts, and rendered judgment for the defendant. The plaintiff thereupon filed a motion in error, and brought the record before this court.

The facts found in the next preceding case are those of the present case so far as applicable, with the further fact that the plaintiff in the present case made no demand upon the defendant for the cattle after they had escaped from the pound and returned to his enclosure, or for the privilege of entering his enclosure to take them, and that the defendant had never refused either to give them up or to allow the plaintiff to enter and take them.

G. W. Phillips and *H. Johnson*, for the plaintiff.

J. J. Penrose, for the defendant.

PARDEE, J. Trowbridge was the lawfully appointed keeper of a pound in the town of Eastford on the 17th day of June, 1876; on that day two haywards of that town took nine cattle belonging to Bosworth, which were running at large in the highway, and delivered them to Trowbridge to be impounded; of this Bosworth had notice within twenty-four hours. Trowbridge kept the cattle in the pound, feeding them at his own expense, until the night of the 22d day of June, when some person, without the knowledge of Bosworth or Trowbridge, illegally broke down the gate of the pound, and the cattle escaped therefrom and returned into Bosworth's enclosure, where Trowbridge found them on the next morning; at that time and place he notified Bosworth that some one had wrongfully suffered them to escape from the pound, and that no one had paid or tendered to him the poundage fees or expenses; and on the 24th day of June he prayed out his writ of replevin, and by virtue thereof the cattle were taken from the enclosure of Bosworth and placed in his own possession, where they remained until the 10th day of July, when Bosworth in turn prayed out a writ of replevin, and by virtue thereof the cattle were placed in his possession, where they have since remained.

The statute compels pound-keepers to receive and keep all cattle lawfully brought to the pound, and provide food and water for them, and declares that the owner shall not redeem or replevy them out of the pound until he has paid the poundage fees and expenses. When therefore the haywards, as agents of and in obedience to the law, brought these cattle to the pound, and Trowbridge in compliance with the same statute had fed them at his own expense four days after Bosworth knew that they were in legal custody and that they were thus being provided for, he had as against Bosworth a lien upon the cattle for his expenses as well founded as if Bosworth had brought them to him and had requested him to feed them. And, after the cattle had been forcibly and illegally taken from the pound and from the possession of Trowbridge as keeper, his right to a lien would authorize him to demand and have a return of them to the pound, to be there detained subject to his lien until released by some legal method. The forcible removal would not of necessity terminate the keeper's right to the possession of or lien upon them; would not of necessity invest Bosworth with such a present absolute legal right to them as would justify him in detaining them after due demand from Trowbridge. But the finding does not show, either that Trowbridge asked Bosworth to re-deliver the cattle to him or for permission to enter his enclosure and take them. He merely notified him that they had been illegally returned to his enclosure by the act of some unknown person. This notice did not make it the duty of Bosworth to take any initiatory step in the matter of returning them to the pound; he had a right to receive the notice in silence; the presence of the cattle in his enclosure was the continuing act of the unknown wrong-doer, for which Bosworth did not become responsible until he had refused permission to Trowbridge to have possession of them. Bosworth, therefore, as a matter of law did not detain the cattle, and the fact that they were within the lines of his enclosure under the circumstances herein detailed did not relieve Trowbridge from the duty of making a demand for, or a request for permission to enter and take them, as a foundation for his writ of replevin. Pre-

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sumably the request would have been granted, and Bosworth is not to be burdened with the expense of defending this writ until he has placed himself in the wrong by a refusal.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

SUPREME COURT OF ERRORS.

FAIRFIELD COUNTY.

SEPTEMBER TERM, 1877.

Present,

PARK, C. J., CARPENTER, PARDEE AND GRANGER, Js.*

45	170
63	594
45	170
66	423

45	170
72	354

45	170
74	573

JACOB T. WEED *vs.* THE BOROUGH OF GREENWICH.

The charter of a borough gave the warden and burgesses authority to order the removal of all encroachments upon any public highway of the borough, and upon the order not being obeyed to cause them to be removed. The warden, acting officially and under a vote passed by the warden and burgesses, caused a fence of the plaintiff along the line of the highway to be removed, the plaintiff not obeying an order previously made for its removal. The fence was in good faith supposed by the warden and burgesses to be an encroachment, but was not so in fact. In an action of trespass brought against the borough, it was held—

1. That the grant of power, though to the warden and burgesses, was in reality to the borough.
2. That the power to remove encroachments was a power asked for and obtained by the borough for its own advantage and not for the benefit of the public.
3. That in the removal of encroachments it was therefore exercising a privilege, not discharging a governmental duty.
4. That the borough was liable for the acts of the warden.

[Two Judges dissenting.]

TRESPASS *qu. cl. fr.*, brought to the Superior Court in Fairfield County. The defendants pleaded the general issue, with notice that they should show that the acts complained of were done by the officers of the borough, under directions from the borough, in removing certain encroachments made by the plaintiff upon a public street of the borough, and were in

* Judge HOVEY of the Superior Court sat in the place of Judge LOOMIS, (who had gone abroad for his health,) in the cases of *Weed v. Borough of Greenwich*, *Mead v. N. York & Housatonic R. R. Co.*, and *King v. The same*.

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pursuance of authority conferred upon the borough by its charter. The case was referred to a committee, by whom the following facts were found:—

The plaintiff had been the owner of the premises on which the trespass was claimed to have been committed since the year 1832. In April, 1871, John Voorhis, warden of the borough of Greenwich, and acting as such in his official capacity, and pursuant to resolutions passed and proceedings had by the court of warden and burgesses of the borough relative to removing encroachments on the highways, caused the plaintiff's fence in front of his house, and all his garden fence fronting on the highway, to be taken up and laid back on the plaintiff's premises, doing as little injury as was possible in making the removal.

Upon the main question of fact in the case, namely, whether the fence of the plaintiff, so removed, was over the line of and upon the highway, and therefore an encroachment on the highway, a great number of witnesses was introduced and testified, and the committee found that at the time of the trespass alleged the plaintiff's fences were not an encroachment upon the highway, and that the same were not lawfully removed.

It was claimed on the part of the defendants that the borough had never at any borough meeting authorized or ordered or ratified any such action on the part of any of its agents or officers; that whatever was done in the way of authorizing the taking down and removal of the fences of the plaintiff was done entirely by the court of burgesses of the borough, and that no borough meeting had ever authorized or ratified their proceedings; and that, if any trespass was committed, the borough of Greenwich was in nowise liable therefor.

The committee found that the borough, acting as such, did never, at any borough meeting, authorize, sanction or ratify the trespasses set forth in the plaintiff's declaration; that whatever was done in the premises was done pursuant to the votes, resolutions and action of the warden and burgesses of the borough; that the warden and burgesses, in whatever

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action they took, acted under the provisions of section 7 of amendments to the charter of the borough, passed at the May session, 1864, of the General Assembly, and which provides as follows:—

“The warden and burgesses are hereby authorized to direct the proprietors of lands fronting any street, highway, public walk or ground, to set out and straighten his, her or their fences in such manner as said warden and burgesses may direct, and said warden and burgesses are hereby empowered, from time to time, to order the removal of all nuisances within the limits of the said borough, and all incumbrances, encroachments or obstructions erected, placed, laid, left, deposited or continued upon any highway, walk, or public ground in said borough; and the person or persons committing or continuing, erecting, placing, laying, leaving or depositing any such nuisances, encroachments or obstructions, shall remove the same upon being notified of such order; and in case such person or persons so committing or continuing, erecting, placing, laying, leaving or depositing any such nuisances, encroachments or obstructions as aforesaid, shall fail to remove the same upon being ordered so to do as aforesaid, then said warden and burgesses shall remove or cause to be removed all such nuisances, incumbrances, encroachments or obstructions; and said borough shall recover the expense of such removal from said person or persons so committing, continuing, erecting, placing, laying, leaving or depositing such nuisances, encroachments, incumbrances and obstructions as aforesaid.”

If the court should be of opinion that upon the foregoing facts the borough of Greenwich was liable, the committee found that the plaintiff was entitled to recover damages in the sum of one hundred dollars.

The court (*Beardsley, J.*) upon these facts rendered judgment for the defendants, and the plaintiff brought the record before this court by a motion in error. The case was argued at a former term of the court, but was re-argued at the present term by order of the court.

W. K. Seeley and S. Fessenden, for the plaintiff.

1. The people comprising the borough of Greenwich sought certain privileges from the state, which were not possessed by them as citizens of the town of Greenwich. They were granted a charter, which they accepted, and by which they were authorized through their officers, the warden and burgesses, to do certain acts which were for their private advantage as a corporation. They were authorized to lay out new streets, walks and public grounds, and to alter and enlarge any existing ones; to order the construction of sidewalks and gutters; and to order and cause to be removed all nuisances and encroachments upon any of the streets within the limits of the corporation. The borough through its officers undertook the duties imposed upon it by the charter, and removed a claimed encroachment upon one of the streets. The act was done in good faith, within the scope and in the performance of corporate powers constitutionally conferred, and in the execution of a corporate duty, which, when executed, would have resulted, had the claim of the borough been true, in a special advantage to it. The defendants are therefore liable both upon principle and authority. The rule is clearly stated by Dillon (Mun. Corp., § 766). "The rule of law is a general one, that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment, by which another is injured. Municipal corporations, under the conditions herein stated, fall within the operation of this rule of law, and are liable, accordingly, to civil actions for damages, when the requisite elements of liability co-exist. To create such a liability, it is fundamentally necessary that the act done which is injurious to others, must be within the scope of the corporate powers as prescribed by charter or positive enactment (the extent of which powers all persons are bound at their peril to know); in other words, it must not be *ultra vires* in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances." The defendants claimed below, that as the fence in fact was not within the limits of the highway, and therefore

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no encroachment, the borough could not be liable, as the charter did not authorize the borough, through its officers, to remove a fence not an encroachment; that the act was *ultra vires*. Such is not the rule; good sense and the authorities are alike against the claim. *Thayer v. City of Boston*, 19 Pick., 511; *Howell v. City of Buffalo*, 15 N. York, 512, 519; *Bennett v. City of Buffalo*, 17 id., 383; *Pekin v. Newell*, 26 Ill., 320; *Dillon Mun. Corp.*, §§ 769, 770.

2. But it is claimed that the borough is not liable, because the warden and burgesses were not its officers or in the performance of corporate powers and duties, but were public officers and in the performance of public duties simply. In the consideration of this subject it must be remembered that the officers of these corporations and their duties under their charters are, in a broad sense, public. They directly, in most cases, and in all indirectly, affect the interest of the general public with whom they have relations; but while this is true, yet in a legal sense these officers and their duties under their charters are mostly of a corporate and private character. They are so unless they are public in the sense of being governmental. While, therefore, it is true that the distinction between officers of the corporation and public governmental officers, and between the duties that are corporate and the duties that are purely public and governmental, have been the subject of much discussion and some difference of views, yet the authorities would clearly appear to class these officers and their duties under the 7th section of the charter, as officers of the corporation and as corporate duties, as contradistinguished from public governmental officers and public governmental duties. The principle upon which these municipal corporations are liable is well stated by CARPENTER, J., in the case of *Jones v. City of New Haven*, 84 Conn., 14. "But when a corporation is charged with the performance of some public duty, as a condition, express or implied, upon which it holds its corporate powers; when a grant is made to a corporation of some special power or privilege at its request, out of which public duties grow, and when some special duty is imposed upon a corporation not belonging to it under the general law,

with its consent; in these and like cases, if the corporation is guilty of negligence in the discharge of such duty, thereby causing injury to another, it is liable to an action in favor of the party injured. The ground of liability in this class of cases seems to be, that the defendant corporation has for a consideration voluntarily contracted to discharge the duty in question. In respect to such duties a town or city is not a mere municipal corporation, but is a private one, and liable as an individual would be under the same circumstances." The same rule is also stated in the cases of *Conrad v. Village of Ithaca*, 16 N. York, 158, and *Weet v. Village of Brockport*, id., 161, both of which cases are cited with approval in *Jones v. New Haven*. And Judge Cooley in his treatise holds to the same view. Cooley's Const. Lim., 2d ed., 247. The same rule was again laid down in the recent case of *Lee v. Village of Sandy Hill*, 40 N. York, 442, decided in 1869. This case has recently been affirmed by the case of *Buffalo & Hamburg Turnpike Co. v. City of Buffalo*, 58 N. York, 639, decided in 1874. See also *Yates v. City of Milwaukee*, 10 Wall., 497; *Hamilton v. City of Fond du Lac*, 40 Wis., 47, 51; *Woodcock v. City of Calais*, 66 Maine, 234; *Sheldon v. Village of Kalamazoo*, 24 Mich., 383; *Soulard v. City of St. Louis*, 36 Misso., 546; *Allen v. City of Decatur*, 23 Ill., 332; *City of Chicago v. Joney*, 60 id., 386; *City of Chicago v. McGraw*, 75 id., 566; *Maximilian v. Mayor &c. of New York*, 62 N. York, 166; *Barnes v. District of Columbia*, 91 U. S. Reps., 540.

3. If it should be said that this grant of power, or imposition of duties, under the 7th section of the charter, is not to the borough as a corporation, but to the warden and burgesses as individuals, we cite the decision in the case of *Weet v. Village of Brockport*, 16 N. York, 170, where Selden, J., in giving the opinion, says: "In all charters creating corporations, powers conferred upon those who stand in place of and represent the corporate body, are deemed to be conferred upon the corporation itself. The cases which prove this are innumerable, and I shall assume it without further argument." The cases of *Lee v. Village of Sandy Hill*, 40 N. York, 442,

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Buffalo & Hamburg Turnpike Co. v. City of Buffalo, 58 id., 639, and *Barnes v. District of Columbia*, 91 U. S. Reps., 540, maintain the same view.

J. B. Curtis and *H. W. R. Hoyt*, for the defendants.

1. The case under consideration presents the necessity for a careful consideration and separation of the different powers conferred upon municipal corporations, and a like careful consideration and separation from those powers of the power directly conferred upon the individuals who are at the same time officers of the corporation, who in the exercise of the powers act as officers of the law and not as agents of the corporation. This distinction is well stated in the case of *Lloyd v. Mayor &c. of New York*, 5 N. York, 370. The city of New York possesses two kinds of powers, one governmental and public, and to the extent they are held and exercised it is clothed with sovereignty. The others are private, and to the extent they are held and exercised it is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former the corporation is a municipal government, in the exercise of the latter it is a corporate legal individual. The power to construct, maintain and repair highways, and to remove nuisances and encroachments therefrom, is a public governmental duty. It is a duty belonging originally to the state, and is for the benefit of the public, and is imposed upon the several municipal and *quasi* corporations by state legislative authority. Angell on Highways, 2d ed., § 302; *Borough of Stonington v. States*, 31 Conn., 213. The duty to construct, maintain and repair highways imposed upon such corporations is not in any sense private, but is a power exercised by the corporation for the state from whence the power is derived. *Chidsey v. Canton*, 17 Conn., 478. But the construction and maintenance of sewers, the laying out and keeping in repair of a park, the lighting of the streets of a city or a borough by night, the supplying of such city or borough with water, &c., are matters of a private character. They are regarded in law as solely for the benefit of the corporation

and not as matters of general concern to the people of the state. *Jones v. City of New Haven*, 84 Conn., 12; *Bailey v. Mayor &c. of New York*, 3 Hill, 538. The removal of nuisances and obstructions from highways is a public governmental duty as much as the duty to construct and repair the same; and when such power is vested in individuals who are at the same time officers of a municipal or *quasi* corporation, they, to the extent of the powers vested in them by the law for that purpose, are officers of the state, or as they are sometimes termed, officers of the law. It being conceded that the construction and maintenance of highways is a public governmental duty, it is very clear that if the borough had taken upon itself under the statutes the obligation to repair the highways within its limits, it would be liable to the same extent and in the same general manner as a town is now liable. If the selectmen of a town fail to keep a highway in repair, in case of injury to persons or property, the town is clearly liable. If the warden and burgesses should fail to do the same thing, and a like injury should result, the borough would be clearly liable. If the selectmen should commit a trespass in repairing a highway, and while acting for the town, in the discharge of the obligation resting upon the town to repair highways, such town would be liable. If the warden and burgesses should commit a like trespass in performing the same duty, and while acting as agents of the borough, in the discharge of the obligation to repair highways, the borough would be liable. In the case of *Thayer v. City of Boston*, 19 Pick., 511, the officers of the city were acting for the city under the general powers conferred upon it to maintain its highways. They did not act under a special statute conferring upon them special powers as individuals and directing them how and in what manner to execute such power. There is a broad distinction between a power of a public character conferred upon a town or other municipal corporation, and a power of a public character conferred upon the individuals who are at the same time the officers of such town or other municipal corporation; in the former case the town or other municipal body acts through its agents, and the act of the

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agent is the act of the corporation. In the latter case the individuals act by virtue of a special statute, which confers certain powers upon them as individuals and thereby constitutes them officers of the state or officers of the law, and directs them as to the manner in which such power is to be executed. They perform a judicial as well as an executive act; the power conferred upon them compels them to exercise judgment, to give notice, and to execute. They act in a judicial capacity as much as appraisers of land, distributors of estates, or officers of the peace, where they arrest and commit on plain view and with personal knowledge. *Tomlinson v. Leavenworth*, 2 Conn., 294. The power conferred upon such persons is not for the special benefit of the borough, but for the public. There is no power in the borough to control their action. The borough could not, if it would, direct them in what manner they should proceed; it could not direct them that a removal should take place before giving notice, and it could not forbid a removal by vote of the borough. They are directed by law to perform acts requiring a promptness quite incompatible with a consultation with the borough, and certainly, if the borough cannot control their action, it should not be responsible for their conduct. But the case under consideration presents this peculiar fact, that the borough had no power over the highway in question, and it is difficult to see how such a power can be inferred from the language of the law. *States v. Stonington*, 31 Conn., 213; *Walcot v. Swampscott*, 1 Allen, 101; *Butterick v. City of Lowell*, 1 Allen, 174; *White v. Phillipston*, 10 Met., 110; *Hafford v. City of New Bedford*, 16 Gray, 297; *Grigg v. Foot*, 4 Allen, 197; *Child v. City of Boston*, 4 Allen, 51; *Haskell v. New Bedford*, 108 Mass., 211; *Russell v. Mayor &c. of New York*, 2 Denio, 461, 481; *Martin v. Mayor &c. of Brooklyn*, 1 Hill, 544, 550; *Jewett v. City of New Haven*, 38 Conn., 368, 372; *Tomlinson v. Leavenworth*, 2 Conn., 292; *Gregory v. Bridgeport*, 41 Conn., 84.

2. The claim of the plaintiff that the warden and burgesses acted as the agents of the borough, is not established by the finding of the committee or of the court. Indeed the

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committee find that the borough has not at any borough meeting authorized, sanctioned, ratified or confirmed their action, nor has the committee or court found that the borough have ever conferred upon them any general power over the matter under consideration; and this being a question of fact and not of law, leaves the plaintiff no foundation upon which to rest his claim. *Thayer v. City of Boston*, 19 Pick., 516. The rule is well established that a municipal corporation is not responsible for the tortious or illegal acts of its officers, although they act *colore officii*, unless such acts are done by such officers within the general scope of their employment, or have been ratified and confirmed by the corporate body. *Dillon Mun. Corp.*, § 770; *Perley v. Inhabitants of Georgetown*, 7 Gray, 464. The plaintiff also claims that the borough in this case is responsible to the same extent and in the same manner as towns are for the neglect of their agents in the repair of highways. But it has already been shown that the borough neither had at the time, nor now has, any control or authority to repair highways or remove obstructions, nor does the charter confer such power. And in order to render the corporation liable, such responsibility must be directly placed upon the borough by the act of incorporation or by the general law. *Hewison v. New Haven*, 34 Conn., 136; *Chidsey v. Canton*, 17 Conn., 475; *Mower v. Leicester*, 9 Mass., 247; *Dillon Mun. Corp.*, § 762. In this case the power conferred is one of merely public and governmental character and has not coupled with it any actual or implied responsibility to private individuals. *Dillon Mun. Corp.*, § 39, and note; *Hewison v. New Haven*, 37 Conn., 481. But it is said that the expense of such removal may be recovered in an action brought by the borough, and this makes the warden and burgesses the agents of the borough. Let us for a moment examine this question. The true interpretation of this part of the act of incorporation is, that the expenses of the warden and burgesses are to be paid by the borough, and that the borough shall afterwards have the right to recover, and shall recover, such expenses from the delinquent. But this right does not make the warden and burgesses agents of the bor-

ough. Most of our public officers and those employed by them in the discharge of their public duties are paid from the treasury of some municipal or *quasi* corporation. Thus a municipal police are paid by the corporation, but they are in no sense its agents in the discharge of their public duties. A fire department is frequently paid by the city to which they belong, but are not its agents. *Hafford v. City of New Bedford*, 16 Gray, 297, 300; *Jewett v. City of New Haven*, 38 Conn., 368. In the case of *English v. New Haven & Northampton Co.*, 32 Conn., 240, it appears that the common council of New Haven were empowered by an amendment to the city charter to order the widening of a bridge over the railroad of the defendants, and in case they neglected to comply with the order the common council were directed to widen such bridge at the expense of the city, and the city treasurer was directed to recover such expense in a suit brought in his own name. And yet this court held that the common council were not agents of the city in ordering the widening of the bridge and enforcing the performance of the order, but officers of the law. No argument can be drawn from the fact that the people within the limits of the borough applied to the General Assembly for their charter and afterwards accepted the same. It is almost always the case that the people of a certain locality apply for a charter, and then ask to have certain powers conferred on the corporation of a private character, and certain powers of a public character, and for powers to be conferred upon certain individuals, constituting them officers of the law for a special purpose; but such application and acceptance neither makes the individuals applying, nor the corporation, liable for the negligence or the misconduct of such officers. The decisions of the courts of New York have been largely cited and commented upon, to establish the doctrine of the liability of the borough. But these decisions are founded upon statutes making certain municipal corporations of that state liable for the acts of certain officers, who, but for such statutes, would be public officers, and not officers of the corporation. 2 N. York Rev. Statutes, 135, 143, 165, 167; 3 id., 171; Statutes of 1859, 713. In the case of *Lee*

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v. *Village of Sandy Hill*, 40 N. York, 442, the commissioners of highways by the charter had the same powers as commissioners of towns, and the court held that the village was liable in the same manner as a town. In the case of *Conrad v. Village of Ithaca*, 16 N. York, 158, the trustees of the village were made commissioners of highways by the charter, and the court held that the village was responsible for their acts in the same manner as a town is responsible.

3. The borough of Greenwich had no interest in the removal of the supposed encroachments. It was matter of public interest to the people of the state at large and not of private interest to the borough. The state owned the easement, the proprietors of the adjoining land held the fee of the highway, and the agents and officers of the state had the control of such highway; how then can it be said that the borough had an interest in the matter? The want of interest involves a want of power, and is necessarily fatal to the claims of the plaintiff. *Gregory v. City of Bridgeport*, 41 Conn., 86. The defendants can therefore say that they had no duty to perform, no rights to defend, and no interests to protect.

PARDEE, J. In 1864 the legislature gave certain additional powers and privileges to the then existing borough of Greenwich by virtue of an amendment of its charter, which was accepted by the corporation and was in the following words:

“The warden and burgesses are hereby authorized to direct the proprietors of lands fronting any street, highway, public walk or ground, to set out and straighten his, her or their fences in such manner as said warden and burgesses may direct; and said warden and burgesses are hereby empowered, from time to time, to order the removal of all nuisances within the limits of the said borough, and all incumbrances, encroachments or obstructions erected, placed, laid, left, deposited or continued upon any highway, walk, or public ground in said borough; and the person or persons committing or continuing, erecting, placing, laying, leaving or depositing any such nuisances, encroachments or obstructions, shall

remove the same upon being notified of such order; and in case such person or persons so committing or continuing, erecting, placing, laying, leaving or depositing any such nuisances, encroachments or obstructions as aforesaid, shall fail to remove the same upon being ordered so to do as aforesaid, then said warden and burgesses shall remove or cause to be removed all such nuisances, incumbrances, encroachments or obstructions; and said borough shall recover the expense of such removal from said person or persons so committing, continuing, erecting, placing, laying, leaving or depositing such nuisances, encroachments, incumbrances and obstructions as aforesaid."

In April, 1871, the warden, acting in his official capacity and pursuant to votes theretofore passed by the court of wardens and burgesses under the grant of power in said amendment relative to the removal of encroachments upon the highways within the borough, took down the fence standing along the front line of a lot belonging to the plaintiff; thereupon he instituted this action of trespass against the borough; and the finding is that the fence, not being an encroachment, was unlawfully removed. The court rendered judgment for the defendants; the plaintiff filed a motion in error.

The governmental duty to keep highways within its limits in good and sufficient repair for public use is not placed upon the *borough*, but upon the *town* of Greenwich, which includes the former; but, for the purpose of enabling the borough at its pleasure to improve the appearance of the streets, and thus enhance the value of property within its limits, it asked for and received power to remove an encroaching fence, irrespective of the question whether or not in fact it constituted an obstruction to public travel. The corporation had legislative permission to do such an act for its own advantage; it was under no legislative command to do it for the public safety.

The court of warden and burgesses constitutes the borough legislature; to this court the accepted charter granted power to take action for the corporation upon the general subject of

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encroachments, to which the particular act complained of relates; they exercised all the powers of the borough in this behalf, and in respect to all external relations must be considered as identical with the corporation; although the grant is in form to the warden and burgesses it is in reality to the borough, to be exercised for its benefit; acting at their pleasure, presumably they acted only when the special interests of the borough were to be promoted; they were not elected by the corporation in obedience to any statute, for the purpose of performing a governmental duty. Thus representing and acting for the borough they ordered the removal of the fence, and the borough should redress the wrong occasioned by the performance of an act in its particular interest, for municipal immunity does not reach beyond governmental duty. It is contrary to all principles of natural justice that the residents within certain territorial limits should seek for and obtain corporate powers for the more ready accomplishment of undertakings specially advantageous to themselves, but not at all necessary for the public, and in such powers find relief for responsibility for wrongs upon private rights.

In the case before us, the warden and burgesses believed that the fence stood upon the highway and that they had the right to remove it; apparently the warden came to the execution of their mandate clothed with official authority and power, not intending any injury. In all like cases it is best for those concerned that the individual should respect that authority and submit to the exercise of it, having knowledge that if he can prove that he has suffered any wrong he can look to a responsible corporation rather than to an irresponsible individual for damages.

In support of the conclusion reached by us we quote some expressions of judicial opinion in this and other jurisdictions, remarking that some of them reach beyond the necessities of the case before us.

In *Danbury & Norwalk Railroad Co. v. Town of Norwalk*, 87 Conn., 109, the respondent town proposed so to construct a sewer, necessary for the drainage of a highway, as to discharge water upon a building belonging to the petitioner.

This court advised a permanent injunction, saying: "Upon the general question of the authority and duty of towns with respect to the proper maintenance of their highways there is no opportunity for controversy. The authority is clear and the duty imperative; always subject however to the salutary qualification, interposed for the protection of others, that this authority shall be so exercised, and this duty discharged in such a manner, as to occasion no wanton injury to the property or rights of other persons, natural or artificial. The question whether such a corporation as the respondent, in consequence of any immunity inherent in its municipal character, is exempt from those liabilities for malfeasance for which individuals and private corporations would be liable in a civil action by the party injured, is no longer an open one. The acts of the character of those now in question involved in the necessary performance of a duty prescribed by a municipal ordinance are strictly ministerial, and when performed by an officer or agent by direction and for the benefit of the corporation, no exemption from liability by the principal can be interposed, when from negligence or wilfulness they are so performed as to produce unnecessary damage to other parties."

In *Thayer v. City of Boston*, 19 Pick., 511, the officers of the defendant city had obstructed the plaintiff's access to the street by the erection therein of stalls along the front of his premises; for this he brought his action on the case against the city; the latter pressed upon the court the argument that, if the officers of the corporation within their respective spheres act lawfully and within the scope of their authority, their acts must be deemed justifiable, and nobody is liable for damages, and if any individual sustains loss by the exercise of such lawful authority it is *damnum absque injuriâ*. But if they do not act within the scope of their authority, they act in the manner which the corporation have not authorized, and in that case the officers are personally responsible for such unlawful and unauthorized acts. Shaw, C. J., said: "But the court are of opinion that this argument, if pressed to all its consequences and made the foundation of an inflexible

practical rule, would often lead to very unjust results. There is a large class of cases in which the rights both of the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done whether it is lawful or not. The event of a legal inquiry in a court of justice may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city in its corporate capacity should be liable to make good the damage sustained by an individual in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party injured no means of redress except against agents employed, and by what at the time appeared to be competent authority, to do the acts complained of, but which are proved to be unauthorized by law. And it may be added, that it would be injurious to the city itself in its corporate capacity, by paralyzing the energies of those charged with the duty of taking care of its most important rights, inasmuch as all agents, officers and subordinate persons might well refuse to act under the direction of its government in all cases where the act should be merely complained of and resisted by any individual as unlawful, on whatever weak pretence; and conformably to the principle relied on, no obligation of indemnity could avail them. The court are therefore of opinion that the city of Boston may be liable in an action on the case, where acts are done by its authority which would warrant a like action against an individual, provided such act is done by the authority and order of the city government, or of those branches of the city government invested with jurisdiction to act for the corporation upon the subject to which the particular act relates, or where, after the act has been done, it has

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been ratified by the corporation, by any similar act of its officers." This decision received the approval of the Supreme Court of the United States in *Barnes v. District of Columbia*, 1 Otto, 540.

In *Hildreth v. City of Lowell*, 11 Gray, 349, the officers of the city entered the plaintiff's close for the purpose of constructing a sewer, without giving to him such previous notice as the city ordinances required; for this act he sued the city. The court said: "There is no doubt that an action of tort may be maintained against a town or city to recover damages for a trespass committed by any of its agents or officers acting under its authority or in pursuance of directions given them, upon the property or estate of another party;" and cites *Thayer v. City of Boston* approvingly.

In *Hawks v. Charlemont*, 107 Mass., 414, the selectmen entered the close of the plaintiff and took stone for repairing a bridge, and thereby exposed the land to be washed and damaged by a river. The court said: "It is manifest that the acts of the selectmen were tortious, and if they were done by the authority of the town an action of tort will lie against the town. Where officers of a town acting as its agents do a tortious act with an honest view to obtain for the public some lawful benefit or advantage, reason and justice require that the town in its corporate capacity should be liable to make good the damage sustained by an individual in consequence of the acts thus done."

In the case of *Lee v. Village of Sandy Hill*, 40 N. York, 442, the charter of the village provided that its officers should be five trustees, and that such trustees should be commissioners of highways of the village, and have the same powers and be subject to the same duties as to the roads of the village as commissioners of highways in towns. Under a written resolution and order of such trustees the overseer of highways wrongfully entered upon the land of the plaintiff and moved back a fence erected by him in front of his lot, the trustees in making the order acting in good faith, erroneously supposing the plaintiff's fence was an encroachment upon the street, and that they were proceeding in pursuance of the authority

conferred upon them by the charter. The court held that to render a municipal corporation liable for the tortious acts of their servants and officers, it is enough that it should appear, either that they were expressly authorized by such corporation, or that they were done *bond fide* in pursuance of a general authority to act for the corporation on the subject in relation to which they were performed; and that the plaintiff could maintain trespass against the village for such removal, whether the trustees were to be regarded as mere agents of the corporation or it was deemed an act of the corporation itself.

In *Buffalo & Hamburg Turnpike Co. v. City of Buffalo*, 58 N. York, 639, the city in making certain changes in one of its highways injured a bridge belonging to the plaintiff; the court held that a municipal corporation is liable for the tortious acts of its agent, where it appears that the agent was expressly authorized to do the acts, or that they were done in good faith, in pursuance of a general authority to act for the corporation on the subject to which they relate.

In *Sheldon v. Kalamazoo*, 24 Mich., 383, the president and trustees of the village directed the committee on streets to notify the plaintiff that his front fence encroached upon the highway and that he must remove it; this he refused to do, and the marshal removed it upon the order of the committee. The court below refused to hear evidence that the plaintiff's fence stood upon the line, for the reason that the president and trustees acted in the capacity of public officers and not municipal agents, and that the corporation is not liable for their acts in the premises. In granting a new trial the Supreme Court said: "The doctrine is entirely untenable that there can be no municipal liability for unlawful acts done by municipal authorities to the prejudice of private persons. In this respect public corporations are as distinctly legal persons as private corporations."

In *Crossett v. City of Janesville*, 28 Wisconsin, 421, the city entered upon the plaintiff's lot and began to construct a highway over it without compliance with the terms of its charter, which provided that no street should be graded with-

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out a recommendation in writing signed by a majority of the resident owners of property situated thereon. The court held that the city was liable to the plaintiff for injury to his lot from the grading of a street by order of the council without such a recommendation.

In *Soulard v. City of St. Louis*, 36 Missouri, 546, the corporation opened a street through the land of the plaintiff without first having the land condemned and damages assessed in the manner provided by its charter. The court said: "Accordingly it has been held that a municipal corporation will be liable where acts are done by its authority which would warrant a like action against an individual, provided such act is done by the authority and order of the city government invested with jurisdiction to act for the corporation upon the subject to which the particular act relates, or where after the act has been done it has been ratified by the corporation."

In *Allen v. City of Decatur*, 23 Illinois, 382, the city council by resolution directed the city supervisor to open a street across the plaintiff's lot without authority of law. The court said: "We shall in this opinion devote our attention to the principal question which has been argued in the case, which is, whether a municipal corporation can be sued in an action of trespass for acts done in obedience to an order of the corporation. The law is now so well settled that it is nowhere controverted that such corporations may be sued in case for tortious acts done under the instructions of such corporations."

In *Woodcock v. City of Calais*, 66 Maine, 234, the city government of Calais passed an order "that the street commissioner be directed to cause all fences now on the public streets to be removed." The street commissioner employed a surveyor to run a line between the plaintiff's land and the street. The line, as run, proved to be outside of the street limits and upon the plaintiff's land. The commissioner, believing the line to be correctly ascertained, moved back the plaintiff's fence in accordance therewith, removed from the plaintiff's land earth and rocks, and built a side-walk thereon. The court, in holding that the principle of *respondeat superior* applied, and that the city was liable to the plaintiff in trespass for the damages, said that the fact that the street commis-

sioner "was expressly directed by the city government to cause all fences on the street to be removed, and that while attempting to follow these directions he committed the trespass which is the foundation of this action, withdraws this case from the application of the principle applicable to cases of public officers. For, while he was a public officer, and had lawful authority to act in the premises without any directions from the city, still the city was responsible for the safe condition of the streets, and chose by positive, formal vote to direct the commissioner. Whether he was obliged to follow the direction or not is immaterial. He did act, and in his action he became *quoad hoc* the city's agent; and we are of the opinion that the superior must respond."

In *Cumberland & Oxford Canal Co. v. City of Portland*, 62 Maine, 504, which was an action on the case for obstructing the plaintiff's canal, the court said that "the declaration avers, and therefore the demurrer admits, that the city of Portland did the acts complained of. Those acts are *prima facie* acts of trespass. No justification or excuse being shown, the plaintiffs are entitled to judgment."

In *Inman v. Tripp, Treasurer of the City of Providence*, 11 R. Island, 520, an action upon the case for discharging surface water upon the land of the plaintiff, the court, in holding that "the doctrine that a municipality cannot be held liable for the consequences of an act which is legally authorized or is required to perform, will not justify an invasion of private property, even if the invasion is only consequential," said:—"The plaintiff's property has been invaded, and the question is whether he is entitled to any remedy against the city for the invasion. There are cases which hold or seem to hold that no action lies against the city even for such an injury. The ground of these decisions is that a city cannot be answerable at law for the consequences of an act which it is legally authorized or required to perform. But we think this doctrine, the abstract truth of which cannot well be gainsaid, is misapplied when it is held to sanction an invasion of private property, even though the invasion is only consequential."

In *Ashley v. Port Huron*, 85 Mich., 296, Cooley, C. J., says, that "it is very manifest from this reference to authori-

ties that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort."

In *Rowe v. City of Portsmouth*, 56 N. Hamp., 291, the court said that the question whether municipal corporations in this country, and corporations in England having some of the powers and charged with some of the duties usually exercised by municipal corporations here, are liable for negligence, carelessness or misfeasance, both in the performance of their legal duties and the doing of voluntary acts within the scope of their authority, has been much considered by the courts on both sides of the Atlantic; and the decided weight of modern authority is, that in this respect they stand like private individuals or corporations."

In *City of Chicago v. McGraw*, 75 Illinois, 566, the court says: "That an action of trespass lies, in a proper case, against a municipal corporation, is not an open question in this court. * * But to render it liable in any case for torts committed by persons claiming to act for it, or by its authority, it must appear that they were expressly authorized to do the acts by the municipal government, or that they were done *bonâ fide* in pursuance of a general authority to act for the municipality on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation. *Thayer v. City of Boston*, 19 Met., 571."

There is error in the judgment complained of.

The Superior Court should render judgment for the plaintiff to recover of the defendants the sum of one hundred dollars damages and his costs.

In this opinion CARPENTER and GRANGER, Js., concurred; PARK, C. J., and HOVEY, J., dissented.

BARNEY FARRELL vs. THE CITY OF BRIDGEPORT.

By the charter of the city of Bridgeport the power of appointment of policemen is vested in the common council, such appointment to be made however only upon nomination by the board of police commissioners, unless the latter fail to make nominations, in which case the council can fill any vacancies by appointments *ad interim*. The commissioners nominated the full number of policemen and the council rejected two of the nominees and thereupon appointed *F* to fill *ad interim* one of the vacancies so made. The police commissioners refused to recognize his appointment as legal, but he tendered his services daily for one year to the proper officer, who refused to assign him to service. Held—

1. That on the failure of the council to approve two of the nominations made, the right to make other nominations for the two places remained with the commissioners.
 2. That there was therefore no vacancy to be filled by the appointment of *F* by the council.
 3. That *F* therefore had no title to the office and was not entitled to the salary.
- A person is not entitled to the salary of a public office unless he both obtains and exercises the office.
- A policeman of a city is a public officer holding his office as a trust from the state, and not as a matter of contract between himself and the city.

The charter of the city provided for the appointment of policemen to hold office until regularly removed or suspended. *F* had held the office of policeman for three years under the charter, when the common council, under a power given by the charter to make ordinances relative to the city police, passed an ordinance that the appointments should be for one year. *F* was nominated and confirmed under the ordinance for one year, and accepted and exercised the office. Held that, if the commissioners and council had no right by a mere new appointment of *F* for the limited term, to terminate his tenure of office under his former appointment, yet as he accepted and exercised the office under the new appointment, he could not claim that his tenure of the office was a continuance of his original tenure.

PETITION for the dissolution of an injunction; brought to the Superior Court in Fairfield County, and reserved upon facts found for the advice of this court. The case is sufficiently stated in the opinion.

H. S. Sanford and *I. M. Bullock*, for the petitioner.

W. K. Seeley, for the respondents.

PARDEE, J. This petition asks for the dissolution of an injunction granted in August, 1873, restraining the clerk,

45	191
63	182
45	191
70	121
45	191
71	546
71	550

auditor and treasurer of the city of Bridgeport from carrying into effect a vote of the common council directing them to pay the petitioner the salary due to a police officer of that city.

The sixty-fourth section of the charter of the city provides as follows:—

“It shall be the duty of the police commissioners to nominate to the common council suitable persons to fill any and all vacancies that may for any cause at any time during their term of office occur or exist among the officers or members of the police department, and to recommend the suspension, removal or expulsion of any officer or member from office or membership in said department, whenever in the judgment of said commissioners such suspension, removal or expulsion shall be for the best interests of the city. The common council shall have the sole power of appointment and removal of officers and members of said department, but no person other than those nominated by the said board of police commissioners shall be appointed an officer or member of said department, and no person shall be suspended, removed or expelled from office or membership in said department, (unless in cases of malfeasance in office,) except on the recommendation of said board of police commissioners: provided that, in case of a failure for any cause to effect a nomination, the common council may proceed to fill any vacancies in said department, in which case the mayor shall have a casting vote; but the persons so appointed by the common council, without a previous nomination by the commissioners, shall be acting officers or members only, as the case may be, and shall hold their appointments *ad interim*, until nominations shall have been duly made by said board of commissioners and confirmed by said common council.”

Under the twenty-fifth section the council has power to make ordinances “relative to the city police;” and in April, 1872, it passed an ordinance of which the first section is as follows:—

“The police force of said city shall consist of a captain of police, two sergeants, to be designated the first and second

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sergeant, and not less than ten nor more than twenty policemen, and not less than ten nor more than thirty special policemen, all of whom shall be electors of said city, shall be appointed in the manner provided in the charter of said city, shall be sworn to the faithful performance of the duties of their office before entering upon it, and shall hold their respective offices until noon of the first Monday in June next succeeding their appointment, and until others are appointed in their stead, unless sooner suspended or removed. Provided however, that if the police commissioners of said city shall fail to nominate to the common council on or before the first Monday of May, 1872, and on or before the first Monday of May in each succeeding year, persons to constitute the police force, said common council may at any legal meeting thereof proceed to appoint acting officers and members of said police force as in case of vacancy, who shall hold their respective offices as in said charter provided."

In May, 1872, Farrell, who had been a member of the police force since 1869, was nominated by the commissioners and confirmed by the council under this ordinance as a policeman for the period of one year from June, 1872.

The council could not of itself, by the enactment of an ordinance declaring that a policeman should hold his office by virtue of an annual appointment, put an end to the right of Farrell to hold the office to which he had been duly appointed in 1869; but the commissioners accepted the ordinance as the rule of their conduct, and subsequently to the passage thereof made all nominations for policemen for the term of one year; and Farrell, in consideration of the new and limited appointment, waived all claim to hold office under the former one; he accepted in 1872 an office for one year expressly established in place of and as a substitute for one of a different tenure; he intentionally discharged the duties and received the salary belonging to it; and by his acceptance and exercise of this new and substituted office surrendered all claim to, and must be holden to have resigned, the former one. It will not therefore now avail him to insist that the commissioners and

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council were not authorized to allow him to exercise the last one.

By the united action therefore of the council, the commissioners and of himself, his right to hold and exercise the office terminated in June, 1873, not to be continued except upon his re-nomination and confirmation by these bodies respectively.

On the 24th day of May, 1873, the commissioners, in pursuance of said ordinance, and in accordance with a previous understanding between themselves and the council that sixteen policemen should constitute the police force of the city, nominated that number of persons as policemen for the year commencing June 2d, 1873. This nomination included some persons who were then holding office as policemen and some who were not. Farrell was dropped. In this nomination, as communicated to and acted upon by the council, no one new name was designated as taking the place of any particular one of those omitted from the list. The nomination of the whole number was made as an aggregate and as an unit to take the place of the former aggregate and unit; by force of this last nomination the entire body of policemen for the preceding year as to all its individuals and in its unity went out of office; if the council failed to confirm any individual of the substituted aggregate a vacancy occurred; the tenure of office of a particular member of the previous aggregate was not thereby extended beyond the last named date.

On the 24th day of May, 1873, the council, having before them this nomination, rejected two persons named therein, one of whom was William Anderson, and in his place substituted the petitioner as an *ad interim* appointee, and during the ensuing year he daily reported to the proper officer, who, under instructions from the commissioners, refused to assign him to or permit him to perform any duty. He now insists that this tender of service entitles him to the salary attached to the office.

The charter provides "that in case of a failure on the part of said commissioners for any cause to effect a nomination the common council may proceed to fill any vacancies."

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But there was no failure on the part of the commissioners to nominate; they had nominated the full number; the council had exercised their right of rejection; the right to nominate other persons in place of those rejected remained in the commissioners, and until they had failed or declined to discharge the duty of nomination the council could not proceed to declare vacancies and fill them by *ad interim* appointments; and, inasmuch as the commissioners were presumably ready and willing to make nominations to fill vacancies resulting from the refusal of the council to confirm such as had been previously made, the appointment of the petitioner by the latter was in violation of the charter and conferred no rights upon him; and he is chargeable with legal knowledge that he could neither hold the office nor draw the salary.

The case finds that on the 2d day of June, 1873, the commissioners amended the record of their action on the 26th day of May by adding a statement thereto that they had nominated William Anderson to take the place of Barney Farrell; but this amendment was made subsequent to the action of the council upon their original general nomination, and no notice thereof was ever given to the latter body.

Again, a policeman of the city of Bridgeport is an arm of the law; he holds an office as a trust from the state; he is a preserver of the public peace; he is not the hired servant of a master; no contract relation exists between him and the city by which he is bound to its service; he can lay down his trust at any time according to his pleasure without exposing himself to an action for damages for breach of contract.

As a rule, so far forth as public officers are concerned, those only are entitled to the salary who both obtain and exercise their offices. Payment follows the actual discharge of duty, and not the formal offer to do it, no matter how honestly or persistently made. *Samis v. King*, 40 Conn., 298.

We advise the Superior Court to dismiss the petition.

In this opinion the other judges concurred.

Clarkson v. Beardsley.

THOMAS J. CLARKSON vs. MILES B. BEARDSLEY AND ANOTHER.

An execution in favor of the plaintiff was levied on a piece of land and the execution returned satisfied. The land proved to be subject to the debts of an estate to which it had belonged, and was afterwards sold by order of the probate court to pay the debts. There were reasons for regarding the order of sale as defective, but it was not void. Held, in an action of debt on the judgment—

1. That if the sale was valid it vested a title in the purchaser that must prevail over that of the plaintiff.
2. That the order of sale, if defective, was good until set aside on appeal.
3. That it was not the duty of the plaintiff, for the purpose of protecting his own title, to have taken an appeal.
4. That the levy of the execution proving to be fruitless, the judgment was unsatisfied, and an action of debt upon it could be maintained.

DEBT on judgment; brought to the Superior Court in Fairfield County and tried to the court, on the general issue with notice, before *Beardsley, J.* Facts found and judgment rendered for the plaintiff, and motion in error by the defendants. The case is sufficiently stated in the opinion.

A. S. Treat and *D. F. Hollister*, for the plaintiffs in error.

D. Torrance, with whom was *W. B. Wooster*, for the defendant in error.

CARPENTER, J. This is an action of debt on judgment. An execution issued on the judgment which was levied on certain land belonging to Mrs. Beardsley, the former wife of the defendant, and one of the judgment debtors, which land was a part of the estate of her deceased father. The execution was returned satisfied, April 11th, 1868. It now appears that the land was subject to the debts and charges due from the estate of Mrs. Beardsley's father.

The administration account on said estate was settled and allowed, October 1st, 1859. From that it appears that the debts and charges allowed against the estate amounted to the sum of three hundred and seventy-eight dollars and forty-six cents.

The Superior Court found that the personal estate applica-

ble to the payment of debts after setting furniture, &c., to the widow, was two hundred and fifty-four dollars. What became of that personal property does not appear. It seems not to have been used for the payment of debts.

On the 21st day of October, 1868, the court of probate passed an order reciting that the debts and charges allowed against the estate exceeded the value of personal estate which could be sold without prejudice to the widow and legatees by the amount of \$378.46, and thereupon ordered the sale of so much of the real estate of the deceased as would raise that sum, with incidental charges of sale, &c. Pursuant to this order the executrix sold the real estate on which the execution was levied to Sarah A. Beardsley, and executed and delivered to her a deed of the same. Whether there was other property of the estate which could have been sold for that purpose does not appear.

Upon these facts the Superior Court rendered judgment for the plaintiff, and the defendants filed a motion in error.

The plaintiff claimed that the judgment was not satisfied by the levy of the execution, and the court below sustained that claim. It must be conceded that if the order of sale and the proceedings under it were valid, the title acquired by Mrs. Beardsley by her deed from the executrix was superior to the title acquired by the levy. In that event the plaintiff takes nothing by the levy. The defendant objects that the order of sale was invalid and that the deed given in pursuance thereof was inoperative. We think this is not so. The order is not void upon its face. The most that can be said is that it may be voidable, and that it could have been set aside upon proper proceedings for that purpose. But such proceedings were not instituted. No appeal was taken, but the order now remains in full force, never having been reversed, vacated or set aside. As it was clearly competent for the court of probate to pass an order of sale, and no question of jurisdiction arises, we are unable to see how the order can be attacked in this collateral manner.

It is further objected that the plaintiff was bound to protect his own title, and therefore that it was his duty to appeal from the probate decree ordering a sale.

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It is not clear that the plaintiff had such an interest in the estate or that he was so situated that he could have taken an appeal. Be this as it may, we cannot say that the law is so that if an appeal had been taken the decree would certainly have been reversed. The validity of that decree would depend upon the facts as they might appear upon the trial of that appeal, and not necessarily upon the facts which appear in this case. Parties would have been interested in such an appeal who have no interest in this suit, and they might have been able to show facts and circumstances which would fully justify the decree. It is impossible for us to say now that they would not.

It is true there are some things in the finding, and some things on the face of the probate proceedings, which would seem to point to a collusion between Mrs. Beardsley and her mother, the executrix, to defeat the plaintiff's levy by taking the same property to pay debts and charges against the estate of the husband and father. Such a collusion, especially if there had been other property which might have been sold to pay such debts, would have been a fraud upon the plaintiff, or defendant, or both; and might, probably, in some other form of proceeding, have been prevented. But fraud is not found in the present case; and if it was, or if it conclusively appeared from the facts found, there is no indication that the present plaintiff was a party to it. The most that can be claimed is that Mrs. Beardsley and others interested in her father's estate may have conspired to roll the burden of this judgment upon her former husband, one of the present defendants. If so, perhaps it was quite as much the duty of the defendant to take measures to defeat the consummation of such a fraud as it was of the plaintiff. At least it is by no means clear that as between themselves all the consequences of such a fraud should now be visited upon this plaintiff.

We think the case was rightly disposed of in the court below, and that there is no error in the judgment.

In this^o opinion the other judges concurred.

ERASTUS F. MEAD AND ANOTHER, TRUSTEES, vs. THE NEW YORK, HOUSATONIC & NORTHERN RAILROAD COMPANY AND OTHERS.

A general law of the state of New York authorized any railroad companies having continuous lines to unite and form a single corporation. Two railroad companies owning roads one of which was wholly within that state and the other partly within that state and partly within the state of Connecticut, made an agreement to consolidate and took all the formal measures required to accomplish it, but a question was made as to the validity of the consolidation by reason of the roads not having at the time a completed continuous track. A resolution of the legislature of Connecticut had provided that, whenever the company owning the road lying partly within this state should be consolidated with any other company in the state of New York in pursuance of the laws of that state, the new company should have all the rights within this state that were possessed by the old. Held—

1. That an act subsequently passed by the legislature of New York recognizing the consolidated corporation as in existence, validated and established the agreement under which the consolidation was made.
2. That when the legal existence of the new corporation in the state of New York became thus established, it satisfied the requirements of the Connecticut act, and the new company became possessed of all the rights in this state which had been possessed by the old company.

And held that the new corporation succeeded to the power, possessed by the old company both in this state and in the state of New York, to issue its bonds to an amount necessary for completing its road, and to mortgage its property and franchise for their security.

And that this power included the power to issue its bonds in exchange for, and to take up, bonds previously issued by the old company and secured by a mortgage of its property.

A bill in equity alleged that the new corporation duly issued its bonds and disposed of a large number of them to divers persons, who were bona fide holders of the same and entitled to receive the money due thereon and to the benefit of the mortgage. Held to be a sufficient averment that the bonds were lawfully issued and used.

After the bonds were issued and the mortgage executed, and while both were outstanding unsatisfied, but before the mortgage had been recorded, a creditor of the company, with knowledge of all the facts, attached and afterwards levied his execution upon the mortgaged property. Held that he stood no better than if, with such knowledge, he had taken a conveyance of the property, and that he did not obtain priority of title.

A court of chancery in this state has jurisdiction of a bill for the foreclosure of such a mortgage, although embracing property out of this state as well as within it.

It is a well established principle that a court of chancery, acting primarily *in personam* and not merely *in rem*, may, where a person against whom relief is

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sought is within the jurisdiction, make a decree, upon the ground of a contract or an equity subsisting between the parties, respecting property situated out of the jurisdiction.

BILL for a foreclosure of a mortgage executed by the respondent railroad corporation to the petitioners as trustees for the holders of its bonds; brought to the Superior Court in Fairfield County.

The New York, Housatonic & Northern Railroad Company, the respondent corporation, was a new corporation constituted by the consolidation of two previously existing railroad corporations, one of which bore the same name, and was located in part in this state and in part in the state of New York, and the other was the Southern Westchester Railroad Company, located wholly within the state of New York. John S. King and John E. Sergeant, who had severally, as creditors of the new corporation, attached the portion of the mortgaged property which was in this state, were also made respondents.

The mortgage in terms covered "all the corporate property and franchises of the said party of the first part, and also all and singular its railroad lying partly in the state of New York and partly in the state of Connecticut, constructed and to be constructed, real estate, rails, fences, bridges, depots, shops, tools, machinery, locomotives, engines, tenders, passenger, freight, baggage and hand-cars, and apparatus and utensils of every kind whatsoever, belonging to said party of the first part, or which shall hereafter be acquired by it."

The following facts were found by the court:—

On the 8th day of September, 1863, a railroad corporation was organized and established in the state of New York, under the general railroad laws of that state, under the name of "The New York, Housatonic & Northern Railroad Company," for the purpose of constructing, maintaining and operating a railroad, from a point in the New York & Harlem Railroad, in the town of White Plains, in the state of New York, to a certain point in the line between the states of New York and Connecticut, and thence to a point in the line of the Housatonic Railroad, near Brookfield Station, in the state of Connecticut, the length of the road to be constructed by

the corporation between White Plains in the state of New York, and Brookfield in the state of Connecticut, being thirty-eight miles, (twenty-four miles in the state of New York, and fourteen miles in the state of Connecticut,) with a capital stock of one million dollars, consisting of ten thousand shares of one hundred dollars each. Soon afterwards the corporation located and established the line of its road in the state of New York, and, prior to the making of the mortgage set forth in the petition, procured the right of way for the construction thereof, and graded from one-half to two-thirds of it, and laid down a temporary track on a part of the road-bed, over which were run an engine and cars used by the contractors for the purposes of construction.

Under an act of the General Assembly of this state, passed at its May session, 1864, and an act passed by the legislature of the state of New York on the first day of May, 1865, authorizing the New York, Housatonic & Northern Railroad Company "to accept a grant for railroad purposes made by the state of Connecticut," the corporation, soon after the passage of the last act, duly located its railroad upon the line and within the limits prescribed by the acts, from the boundary line between the states of Connecticut and New York at Greenwich to the Housatonic Railroad in Brookfield; and obtained title in fee simple to the lands in Brookfield and Danbury, necessary for the railroad and for depots thereon, along the line from the Housatonic Railroad to the village of Danbury, and obtained the right of way for the construction of the residue of the line of road within this state; and constructed, completed, equipped and put into full operation that part of the road between the Housatonic Railroad and the village of Danbury before the making of the mortgage, and the road then was and has ever since been in full operation between the two points last mentioned.

Afterwards, under an act of the General Assembly of this state, entitled "An act enabling the New York, Housatonic & Northern Railroad Company to embrace all its property in New York and Connecticut in one mortgage," passed at its May session, 1867, the corporation on the second day of Sep-

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tember, 1867, in the state of New York, made and executed, in conformity with the laws of that state, a mortgage of that date, whereby it mortgaged all its property and franchises in both states to trustees as security for its bonds to be issued to the amount of one million of dollars, (only one of which bonds was ever issued,) which mortgage was afterwards, in the month of September, 1868, duly satisfied and discharged of record; and on the 1st day of August, 1868, the corporation in like manner made and executed a certain other mortgage of that date, in the state of New York, mortgaging all its property and franchises to the petitioners as trustees, as security for its bonds to be issued to the amount of two millions five hundred thousand dollars, a large amount of which bonds were sold; which mortgage was also, (about the 4th day of December, 1872, in the state of New York, and about the 6th of said December in the state of Connecticut,) duly satisfied and discharged of record. The corporation held its annual stockholders' meetings, appointed directors, kept a record of the doings of its stockholders and directors, and performed many other corporate acts until about the 10th day of September, 1872.

Prior to the 18th day of April, 1872, another railroad corporation had been duly organized and established in the state of New York, under the name of the Southern Westchester Railroad Company, for the purpose of constructing, maintaining and operating a railroad from a point in the line of the New York, Housatonic & Northern Railroad Company, a little east of White Plains, in a southeasterly direction about sixteen miles to Long Island Sound, at or near Harlem River, with a capital stock of two millions of dollars, in shares of one hundred dollars each; and on the day last aforesaid had a president, board of directors and other officers, and was then in active operation and full life, and then owned franchises and property of large value; but no part of its railroad had been completed or in operation, and it was not then operating in fact any railroad within, or partly within and partly without, the state of New York. The railroads of the two corporations were capable of forming, and would form

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when completed, a continuous line of railroad with each other from the Housatonic Railroad, through the point of their union with each other before mentioned, to the Harlem River.

On the 18th day of April, 1872, the two corporations undertook, under the laws of the state of New York then in force respecting the consolidation of railroad companies, to merge and consolidate their several capital stocks, franchises and property into one company, and the directors, officers and stockholders of the two corporations respectively made and adopted an agreement of consolidation, and did respectively all those things which are required by those laws to be done in order to perfect such consolidation between two railroad companies having the right to consolidate with each other under those laws; so that, if, upon the facts herein set forth, the two corporations then had a legal right to consolidate with each other under those laws, they became by said proceedings duly consolidated. The agreement of consolidation was executed under the corporate seal of each of the companies on the 18th day of April, 1872, and was adopted by the stockholders of each of the companies in due form separately on the 10th day of September, 1872; was executed by the presidents of the companies respectively, by the authority and direction of the boards of directors of the companies respectively; and a certificate thereof was filed in the office of the secretary of the state of New York on the 3d day of October, 1872. The name of the consolidated corporation under the agreement was "The New York, Housatonic & Northern Railroad Company."

On the 8th day of October, 1872, a meeting of the stockholders of the consolidated company was duly holden, at which a board of directors was chosen, to wit, George W. Mead, David S. Duncomb, L. D. White, E. F. Mead, T. Clark, Jr., H. Hall, E. E. Bouton, C. D. Bailey, W. Keeler, J. Benedict, S. D. Mead, L. D. Rucker, and William Raynor, who accepted their trusts and then became and acted as directors of the new company for the year next to ensue; and the board of directors held a meeting afterwards on the same day and appointed L. D. Rucker president of the new company,

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and heard read the mortgage which is set forth in the petition; and thereupon, by a unanimous vote, authorized Rucker, as president, to execute and deliver the mortgage and the bonds thereby to be secured, for and in behalf of the new corporation; such mortgage to be made to the present petitioners, Erastus F. Mead and David S. Duncomb, as trustees for the holders of the bonds to be issued under the mortgage. Afterwards on the 18th day of October, 1872, Rucker, as president, did execute to the petitioners the mortgage in due form in the name and behalf of the new corporation, and the same was made and perfected in conformity with the laws of the state of New York relating to the making of such mortgages, and was delivered by Rucker to the petitioners, who caused the same to be duly recorded in the county of Westchester in the office of the clerk and register of the county on the 4th day of December, 1872, and in the office of the secretary of the state of Connecticut on the 9th day of December, 1872, and in the land records of the towns of Danbury and Brookfield respectively on the 19th and 24th days respectively of September, 1874.

All the bonds provided for in the mortgage were afterwards duly executed and issued, and delivered in different amounts to different persons for valuable considerations received by the corporation therefor—a portion of the bonds, amounting to about \$600,000, being issued and used in exchange for, and for the taking up of, the same amount of bonds then outstanding which had been issued under and secured by the second mortgage of August, 1868, made by the original New York, Housatonic & Northern Railroad Company.

The consolidated company has ever since regularly held annual stockholders' meetings and appointed its boards of directors, and has expended a small amount of money and done a small amount of work on the lines of both the first mentioned roads.

John S. King, one of the respondents, on the 2d day of September, 1874, brought an action at law against the consolidated company by a writ of attachment which was levied upon the real estate and other property of the company in

Danbury and Brookfield mentioned in the mortgage, and afterwards recovered judgment against the company for the sum of \$132,796.14, debt and costs, and on the 22d day of April, 1875, caused an execution to be issued on the judgment, which, afterwards, on the 3d and 4th days of May, 1875, was levied upon the lands of the corporation in the manner prescribed by law for the levy of execution upon lands not encumbered by mortgage, and not in the manner prescribed by law for the levy of execution upon an equity of redemption in lands—said lands being all of the lands of the corporation situated in the towns of Danbury and Brookfield respectively, and being lands covered by and embraced within the mortgage made by the new corporation; by which levy the officer set out to King, (if such levy was in legal form,) all said lands in satisfaction of part of the judgment; which execution was afterwards duly returned and recorded. The levy took no notice of the mortgage, and was made in disregard thereof. King has ever since claimed that the levy was valid, and vested in him a good title to the lands in fee simple.

At the time of the execution and delivery of the mortgage in question, and at the time of the execution and issue of the bonds thereby secured, King had full and actual knowledge of such execution, delivery and issue, and knew at the time of the commencement of his suit that the same were still outstanding and unsatisfied. The suit was brought by King as assignee of certain judgments in some of which Rucker then had an interest, and as the agent of Rucker to the extent of his interest; and Rucker, at the time of the commencement of the suit, had the same full and actual knowledge which King had, in relation to the mortgage and bonds.

The facts found with regard to the claim of the respondent Sergeant are omitted, as no question arose thereon in this court.

Prior to and at the time of the service of the petition in the present case all the bonds secured by the mortgage were, and still are, outstanding in the hands of sundry persons, namely, one thousand seven hundred and fifty bonds for one thousand dollars each, and five hundred bonds for five hundred

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red dollars each; each of said bonds having attached to it the set of coupons or interest warrants properly belonging to it in conformity with the plan and provisions of the mortgage, and each of the coupons being, on its face and in its terms, made payable to the bearer thereof. One of the coupons on one of the bonds has been paid, and no more.

At the time of the service of the petition there was due from the corporation, as interest upon each of the bonds of one thousand dollars, five coupons of \$35 each, dated October 1st, 1873, April 1st, 1874, October 1st, 1874, April 1st, 1875, and October 1st, 1875, respectively; and there were then, in like manner, due from the corporation, as interest upon each of said bonds for five hundred dollars, five coupons of \$17.50 each, bearing the same dates last above mentioned respectively, each of which coupons was then due to the lawful holder thereof (except only the single coupon found to have been paid); all of which coupons, so then due, are still unpaid, and are due and payable to the lawful holders of them respectively, and the total amount due from the corporation, as interest upon all the bonds to all the holders of the coupons, and then unpaid, was \$349,965.

The value of the property in this state covered by the mortgage is one hundred thousand dollars.

Upon these facts the court (*Beardsley, J.*,) passed a decree foreclosing the mortgage unless the amount due upon the coupons was paid to the several holders with interest, (the decree providing for a deposit in a bank named of the amount of any coupons not presented for payment within the time limited for redemption,) and declaring the levy of the execution of the respondent King to be of no effect, and conferring no title to the property, and that the respondent Sergeant had no title to the mortgaged property or any part thereof.

The respondent King and the New York, Housatonic & Northern Railroad Company filed a motion in error and brought the record before this court, assigning the following errors:

1st. That the mortgagors at the time of the making of the mortgage had no legal or valid existence.

2d. That the agreement for consolidation was inoperative and void because neither of the corporations was then "operating a railroad either wholly within or partly within and partly without the state of New York."

3d. That the consolidation, if valid in the state of New York by the laws thereof, did not and could not transfer to the new company the rights, franchises and property of the old company in this state and the new company at the time of the mortgage had no interest therein.

4th. That the Superior Court had no jurisdiction of the subject matter and no right or authority to pass any decree in the premises, inasmuch as the property was included in a New York mortgage and subject to the laws and courts of that state.

5th. That a part only of the property described and included in the mortgage was charged with the payment of the entire amount found due.

6th. That the respondents were required to determine who are the "lawful" owners and holders of the unpaid coupons.

7th. That the respondents were required to deposit in bank the amount of all the unpaid coupons not presented, and which were outstanding and unpaid.

8th. That the franchises granted by this state were included in the mortgage and in the decree.

9th. That it was neither averred, nor proved true, that the bonds were used for the purposes for which they purport to have been issued.

10th. That the mortgage was not recorded in this state until after the levy of the attachment of King.

J. N. Whiting, of New York, and *A. S. Treat*, with whom was *R. Averill*, for the plaintiffs in error.

1. The original New York, Housatonic & Northern Railroad Company was organized on the 8th day of September, 1863, under the general laws of the state of New York, with a capital stock of \$1,000,000, for the purpose of constructing a railroad from White Plains to the Housatonic Road in

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Brookfield, partly in New York and partly in Connecticut. Being a New York corporation, of course they had no right to build any road in this state. Instead of forming another company in this state, the company applied to the legislature and obtained by resolution the powers usually conferred by charter upon railroad companies in this state. There was one company in name, but acting in and by authority from different states, and subject to different laws; practically two companies, one holding and managing the road and property in and according to the laws of New York, the other holding and managing the road and property in and according to the laws of Connecticut. By the general law of New York the company had power to borrow money "for completing and finishing or operating their road, to issue and dispose of bonds therefor, and to mortgage their franchises and property to secure the same." 2 N. Y. Rev. Stat., p. 533. In Connecticut railroad companies may borrow money and issue bonds equal in amount to one-third the amount actually expended, and may secure them by a mortgage of their property to the treasurer of the state. Gen. Stat., p. 332, 333. The court will observe the marked difference in the provisions of these different states upon the same subject. In 1867, being desirous of borrowing money, the company obtained authority from our legislature to include in a mortgage of their New York franchises and property, their franchises and property in this state. Two mortgages were subsequently made, but as they were satisfied of record before the parties interested acquired any interest in the mortgaged property it is unnecessary to notice them farther. In the order of time we now come to the mortgage in question, made October 1st, 1872. Of course proper parties capable of contracting are indispensable to a valid deed. This deed purports to have been made by "The New York, Housatonic & Northern Railroad Company."

2. We say this company had no legal or valid existence. It claimed to have been formed by a consolidation of the old company of the same name with the Southern Westchester Railroad Company. The right of these companies to consol-

idate must of course be sought in the law of New York, where both companies were located. By that law, (2 N. Y. Rev. Stat., 556,) any railroad company "operating a railroad either wholly within or partly within and partly without the state," might merge and consolidate with any other company, both having been duly organized. The court finds that the Southern Westchester Company was not in fact at the time so operating a railroad. The court also finds that the old company had located the line of its road in New York, had graded only from half to two-thirds thereof, and had laid a "temporary track on some parts thereof," over which the contractors, not the company, ran "an engine and cars for the purposes of construction." This the gentlemen call "operating" a railroad. The act of 1864, of this state, also requires the road to be "put in operation." "Operating" a railroad within the meaning of these statutes is its constant use in the running of trains in its regular course of business, for passengers and freight, over its entire length. *People v. Albany & Vermont Railroad Co.*, 24 N. York, 261; *State v. Hartford & New Haven Railroad Co.*, 29 Conn., 538. So then the company was not at the time of the attempted consolidation "operating" a railroad anywhere. Companies cannot consolidate without the sanction and authority of the legislature, and must bring themselves clearly within the provisions upon which the authority is granted. Green's Brice's *Ultra Vires*, 278. A charter being a contract any alteration must have the sanction of the legislature. *Id.*, 539. The legislature itself cannot make an alteration without previous public notice. Gen. Stat., 79. A corporation cannot even dissolve itself. *Reed v. Cornwall*, 27 Conn., 48. And as a corporation can neither create nor destroy itself, so it can neither form nor dissolve another, either alone or with others. *Medical Institution v. Patterson*, 1 Denio, 61. But it is said that the consolidation has been ratified, and we are referred to several acts passed by the legislature of New York. Doubtless an attempted consolidation without authority may be ratified and validated by the same sovereign power that could have granted the necessary authority before consolidation.

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But an enactment of this sovereign power is necessary in both cases, and just as necessary in one as in the other. And the act must be express; it must have all the usual formalities and be passed with intent to ratify. *Bishop v. Brainard*, 28 Conn., 289. These acts of the legislature were nothing more than a recognition. Now a recognition is one thing, a ratification quite another. In the organization of companies some things are essential, some non-essential; some matters of form, some of substance; some indispensable, some not. Recognition applies only to defects in form. *Black River &c. R. R. Co. v. Barnard*, 31 Barb., 258.

3. If consolidation was valid or made valid in the state of New York, still that did not in anywise affect the title to the mortgaged property in this state. The original corporation still remained in existence in this state, even though the consolidation was valid under the laws of New York. *Muller v. Dows*, 4 Otto, 444, 447. If the title did pass from the old company to the new, then how and by what authority? All we have to do is to look at the grant of power by this state in 1864, and accepted by the company in 1865. No such authority is conferred. The conferring of powers and privileges imposes corresponding obligations. An accepted charter being in the nature of a contract, one of the parties cannot release itself and substitute a new party. The consent of the other is indispensable. "It is a rule of construction that all grants from the state and grants of franchises must be construed strictly and most strongly in favor of the public and against the grantee." Green's Brice's *Ultra Vires*, 63, and cases there cited. "The existence, franchises, powers, capacities, duties and liabilities of every corporation are created, fixed, limited and qualified, both in action and time, by the law of the state granting the charters. *Penobscot Boom Corporation v. Lawson*, 16 Maine, 224; *Michigan Bank v. Gardner*, 15 Gray, 362. In Connecticut "a corporation has only such rights and powers as are expressly granted, or as are necessary to carry into effect the rights and powers so granted." *Occum Co. v. Sprague Manuf. Co.*, 34 Conn., 541. In New York "the powers granted will extend no further than

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expressly stated, or than is necessary to accomplish the general scope and purpose of the grant." *N. York & Hartford R. R. Co. v. Kip*, 46 N. York, 552. In addition to the powers enumerated or expressly given "no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given." 2 N. Y. Rev. Stat., 391.

4. The courts of this state have no jurisdiction. The mortgage and the petition both count on the act of 1867. It is a little difficult to see how an act of 1867, authorizing the old company then existing to do certain things, can authorize the new company, organized five years afterwards, to do the same thing. The act is a peculiar one. It first provides that the company, in any mortgage of its property in the state of New York, may include its property in this state; then declares that "such mortgage shall be deemed and held good and valid, and then defines its "operation and effect." Everybody in this state knows what a good and valid mortgage is, its operation and effect, what rights and remedies it gives, and if it was to have merely the ordinary "operation and effect" then the last clause of the act is superfluous and without significance. It says such mortgage shall have the same "operation and effect upon said property rights and franchises of said corporation in this state as if said property rights and franchises were held and owned in the state of New York, and were so mortgaged in that state pursuant to the laws thereof." That is, that the entire property should be subject to the laws and courts of only one state. This state transferred its jurisdiction over it to the state of New York so far as this mortgage is concerned. In New York mortgaged premises are sold, in this state a time is limited for redemption. The inconvenience, not to say injustice, of different proceedings in different states is quite obvious, and is a good reason why the company procured the act to be passed. It was to prevent just the result of which we complain, that part of the property is charged with the whole amount found due, that the act was sought for and obtained.

5. The respondents are required to determine who are

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"lawful" owners of the bonds. The decree requires them to pay every "lawful owner and holder," or lose their property. The use of the word "lawful" is both suggestive and significant. The court evidently deemed it quite possible, if not more than probable, that some of the parties having bonds and coupons were not "lawful owners and holders." The petitioners, at the time of the mortgage, were also directors. Suppose they had each taken a large amount of the bonds at fifteen per cent. of their par value in payment of debts they had or claimed to have against the old company, and now hold them, would they be "lawful owners and holders"? The statute prescribes for what money may be borrowed, bonds issued and mortgages given. The mortgage also specifies the object to be "for constructing, operating and maintaining its railroad," and the act of 1867 declares the mortgage "good and valid" "for the purpose therein specified," and also prescribes what debts and liabilities of the old companies shall attach to the new, and expressly excepts mortgages. Yet \$600,000 of new bonds were issued and used to take up the same amount of old bonds, secured by mortgage of the old company in August, 1868. Clearly the first owners and holders of these bonds cannot be "lawful" owners and holders. The court should have found who were the lawful owners, or at least have laid down some rule by which the company could decide. Suppose the company knew, or upon investigation should find, that some of the coupons are not lawfully held and owned, and upon presentation payment is refused or they are not presented, then the respondents must deposit the amount of all unpaid coupons in bank, where it can be obtained without enquiry. If a large amount of bonds or coupons have been lost, destroyed by fire or otherwise, the bank under this decree will reap the benefit.

6. The franchises granted by the state are included in the mortgage and decree. If the mortgage was under the act of 1867, then they were properly included. But the act of 1867 could apply only to the company then in existence, which could not transfer its power to the new company. But it has been and may be claimed that railroad companies have the

same right to mortgage their property as individuals. Without discussing the question whether the provisions of our statute prescribing the mode and purposes in and for which money may be borrowed and bonds issued by railroad companies does not limit them to the mode and purposes prescribed, we simply say that franchises cannot be mortgaged without express legislative authority. Green's Brice's *Ultra Vires*, 124, and cases cited in note.

7. It is neither averred nor proved that the bonds were used for a lawful purpose. The averments of the petition are that the mortgage was made to the petitioners "as trustees, for the benefit of all persons who should thereafter become holders in good faith of such bonds," that is, bonds issued by the company for money borrowed "for the purpose of constructing, maintaining and operating its railroad." Also that the company "did make, issue, sell, deliver and dispose of, to divers persons, a large number of bonds," whereby "many persons became and were and still are the bonâ fide holders and owners thereof." The petition should also have stated, as it does not, what the bonds were sold for, and how these persons became and are bonâ fide holders thereof, and then the court could have determined whether they were or not. Bonds can be issued only for money borrowed. If the bonds or coupons were negotiable then an innocent third party might be a lawful holder. But no such question arises in this case, as the court has not found either that the bonds were negotiable or that they or the coupons are held by innocent parties. The court has found that all the bonds were issued and delivered to different persons "for valuable consideration." But has not found that they were so issued for the statute consideration, "money borrowed," or for any full, fair and adequate consideration.

8. The mortgage was not recorded in this state until after King's attachment. It is true that the court has found he had knowledge of the mortgage, but it has also found that his attachment was made September 2d, 1874, while the deed was not recorded in Danbury and Brookfield until September 19th and 24th, 1874. Very nearly two years had elapsed and

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no excuse is offered for the delay. The question then is, whether an attaching creditor with notice shall be postponed to a grantee of a prior mortgage not recorded within a reasonable time. Manifestly there is a difference between an attachment and a purchase. One creditor is as much entitled to payment as another, and may as lawfully secure his debt by attachment as the other by mortgage. If anybody is chargeable with fraudulent conduct it is the trustees who kept their deed from record two years. The reason a subsequent purchaser with notice is postponed, is that "his purchase in such a case is a fraud." Why? "Because he is assisting the prior vendor to defraud the prior vendee." *Le Neve v. Le Neve*, 3 Atk., 646; *Jackson v. Bengoll*, 10 Johns., 457. "The rule is founded on the presumed fraud of the party." *Wheaton v. Dyer*, 15 Conn., 311. The fraud consists in depriving the first grantee of something, or as Lord Hardwicke said, it "takes away the right of another person." *Le Neve v. Le Neve*, 3 Atk., 654. By our statute (Gen. Statutes, p. 358,) the grantee of a valid deed unrecorded holds only against the grantee and his heirs; he has good title against them, but has none against an attaching creditor. Its record is as indispensable to a complete title as the deed itself. *Welch v. Gould*, 2 Root, 287. An attaching creditor takes no interest that the prior grantee has; he is guilty of no fraud himself, and participates in no fraud of another. The reason of the rule applied to purchasers does not exist in the case of an attaching creditor, and therefore the rule does not apply to him. The true rule then is, that a conveyance to be effectual to hold lands against an attaching creditor must be actually recorded in a reasonable time. And this rule is supported by the decisions in this state. *Hartmyer v. Gates*, 1 Root, 61; *Moor v. Watson*, id., 388; *Welch v. Gould*, 2 id., 287; *Hinman v. Hinman*, 4 Conn., 575; *Carter v. Champion*, 8 id., 549; *Peck v. Whiting*, 21 id., 206; *Pond v. Skidmore*, 40 id., 213. But suppose we are wrong as to the law of Connecticut, then we call the attention of the court to the law of New York. As this is a New York mortgage, which "includes" property in this state, and has the "same operation and effect"

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upon it as if it were held and owned in that state, it would seem that this question should be decided by the law of New York. The rule there with regard to purchasers with notice is the same as here. In a very recent case between the trustees of an unrecorded railroad mortgage and an execution creditor with notice, the Court of Appeals decided in favor of the creditor. *Hoyle v. Plattsburgh & Montreal R. R. Co.*, 54 N. York, 314. If then the law of Connecticut be as we claim, or the law of New York governs, evidently King's execution was properly levied, and he will hold against the petitioners.

H. B. Harrison and *W. K. Seeley*, for the defendants in error.

HOVEY, J. The motion in error upon which the record in this cause is brought before us for revision, was filed by the respondent King as a stockholder and an attaching and execution creditor of the other respondent, the New York, Housatonic and Northern Railroad Company; and he is the only party who actually appears here as plaintiff in error and claims to be aggrieved by the decree of the Superior Court, though the respondent company is nominally a party.

Several questions are raised by the assignment of errors, some of which, owing to their importance, deserve careful consideration.

The first question is whether the respondent, the New York, Housatonic and Northern Railroad Company, at the time it executed, delivered and issued the mortgage and bonds described in the bill of the plaintiffs below, had a corporate existence under the laws of this state or of the state of New York. The record shows that on the 8th day of September, 1863, a corporation was duly organized under the laws of the state of New York, by the name of the New York, Housatonic and Northern Railroad Company, for the purpose of constructing, maintaining and operating a railroad from a point in the New York and Harlem railroad in the town and village of White Plains in that state, to certain points in the

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boundary line between that state and this, and thence to a point in the Housatonic railroad near Brookfield station in Fairfield County, and also for the purpose of operating a railroad between the latter point and the points referred to at the state line and in White Plains and the city of New York; that the corporation so organized soon afterwards located and established the line of its road in the state of New York, procured the right of way for the construction thereof, graded from one-half to two-thirds of the same, and laid down a temporary track on some parts of the road, over which were run an engine and cars, by the contractors, for the purposes of construction.

On the first day of July, 1864, that corporation obtained from the General Assembly of this state authority to continue and extend its road from the point where it touched the state line, to the Housatonic railroad in the town of Brookfield; to purchase, receive and hold, in fee simple or otherwise, such real estate as might be necessary or convenient for the objects and intentions of the act by which such authority was conferred; to construct, complete, equip, maintain, use and enjoy, a single, double or triple railway upon the route which should be duly laid out or located; and to take, transport and convey persons and property upon the said railway; and also the further authority to make any lawful contract with any other railroad company with whose road its track might connect, in relation to the business or property of the same, and to take lease of any railroad, or lease its railroad to, or make joint stock with, any connecting railroad running in the same general direction as the route of its road; together with all the powers and privileges which then were, or which thereafter should be, conferred on all railroad companies incorporated under the authority of this state, but subject to all the duties, liabilities and regulations imposed upon such railroad companies.

On the first day of May, 1865, this corporation was authorized by the legislature of New York to accept and exercise the powers conferred by the General Assembly of this state, and subsequently did accept the same and located its railroad

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from the state line to the Housatonic railroad in Brookfield, and obtained title, in fee simple, to lands in Brookfield and Danbury necessary for its road and for depots along its line from the Housatonic railroad to Danbury. It also obtained the right of way for the construction of the residue of its road within this state, and constructed, completed, equipped and put into full operation that part of its road between the Housatonic railroad and the village of Danbury; and that portion of the road has ever since been in full operation.

On the 20th day of May, 1869, an act was passed by the legislature of New York, making it lawful for any railroad company organized under the laws of that state or of that and any other state, and operating a railroad or bridge either wholly within or partly within and partly without that state, to merge and consolidate its capital stock, franchises and property with the capital stock, franchises and property of any other railroad company or companies organized under the laws of New York, or under the laws of that and any other state, or under the laws of any other state or states, whenever the two or more roads of the companies so to be consolidated should or might form a continuous line of railroad with each other or by means of any intervening railroad, bridge or ferry. The act prescribed the mode by which the consolidation might be made and perfected, and provided that when the agreement and act of consolidation were so made and perfected, and when the same or a copy thereof was filed in the office of the secretary of the state, the corporations parties thereto should be deemed and taken to be one corporation by the name provided in said agreement and act, but that such act of consolidation should not release such new corporation from any of the restrictions, disabilities or duties of the several corporations so consolidated. And it was further provided that upon the consummation of the act of consolidation, all and singular the rights, privileges, exemptions and franchises of each of the corporations parties to the same, and all the property, real, personal and mixed, and all debts due, on whatever account, to either of said corporations, should be deemed to

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be transferred to, and vested in, such new corporation without further act or deed.

On the 18th day of April, 1872, an agreement was made between the said New York, Housatonic & Northern Railroad Company and the Southern Westchester Railroad Company, a corporation duly organized under the laws of New York, for the consolidation of the capital stocks, franchises and property of the two corporations. The agreement was in the form prescribed by the New York statute and was duly executed, and on the 10th day of September, 1872, was adopted by the stockholders of each of the corporations; and the same was filed in the office of the secretary of the state of New York on the 3d day of October, 1872. Nothing more was required by the laws of New York to perfect the agreement and consummate the act of consolidation, if, by those laws, the corporations, parties to the agreement, had the right to consolidate their capital stocks, property and franchises, and thus become one corporation. The plaintiffs in error claim that no such right existed, because, although the railroads of the two corporations were capable of forming, and would form when completed, a continuous line of railroad from the Housatonic railroad to the Harlem river, neither of the corporations, at the time the agreement of consolidation was made, was operating a railroad or bridge wholly within or partly within and partly without the state of New York. This claim is an extraordinary one for the party to urge who appears here in no other character, and who has no other interest in the event of this suit, than as a stockholder and creditor of the consolidated corporation. But it is conclusively answered and disposed of by an act of the legislature of New York passed in 1873, which expressly recognized the existence of the consolidated corporation, and thereby ratified and confirmed the agreement by which the consolidation was effected. N. York Stat. of 1873, page 293. It is said, however, by counsel for the plaintiffs in error, that that act was a recognition merely of the corporation, and did not operate as a ratification of the agreement of consolidation. And the case of *Black River Railroad Co. v. Barnard*, 31 Barb., 258,

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is cited in support of this position. But the court in that case held that, when the organization of a railroad company is regular on its face, and the company, while in the exercise of its corporate franchises, is recognized as such by the legislature, it becomes, by that recognition, a legal corporation. In the case of *The People v. Farnham*, 35 Ill., 562, it was held that, where a municipal corporation has been recognized by enactments of the General Assembly, all inquiry into the regularity of its organization will be precluded. And in the case of *Kanawha Co. v. Kanawha &c. Coal Co.*, 7 Blatch., 391, it was held that defects in the incorporation of a company under a general mining and manufacturing companies law, were cured by the passage of a subsequent special act recognizing the company by name and extending and continuing its corporate rights and privileges.

So far then as the state of New York is concerned, there can be no doubt that the agreement of consolidation was in all respects valid; and the effect of it was to transfer to and vest in the consolidated corporation all the rights, privileges, franchises and property of the two original corporations in that state. And if such consolidation was authorized by the laws of Connecticut, the effect of it was to vest in the consolidated company all the rights, privileges, franchises and property of the original New York, Housatonic & Northern Railroad Company in this state. The General Assembly of this state, by an act passed on the 31st day of July, 1872, expressly authorized such consolidation, and declared its effect in the following language:

“Resolved by this Assembly: Sec. 1. In case the New York, Housatonic & Northern Railroad Company shall avail itself of the powers conferred upon certain railroad companies by the laws of the state of New York, authorizing the consolidation of such railroad companies, and shall, in pursuance of such laws, consolidate with any other railroad company, the new corporation formed by such consolidation, shall have and possess, in this state, all the rights, powers, privileges, exemptions, franchises and property now possessed by said New York, Housatonic & Northern Railroad Com-

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pany in this state, or which have heretofore been conferred upon it by the General Assembly of this state, and shall be subject to all duties and liabilities, in the same manner and to the same extent as if such consolidation had not taken place." By the second section of the act the rights of all creditors of the said New York, Housatonic & Northern Railroad Company, and all liens upon its property, were preserved unimpaired, and authority was given to enforce them against the new corporation.

The requirement of the foregoing act that the consolidation shall be in pursuance of the laws of the state of New York, is fully satisfied by any proceeding in that state by which the consolidation is legally effected, whether by a lawful agreement for such consolidation, or an act of the legislature effecting it, or a recognition by the legislature of the consolidated corporation as in existence.

The legal existence of the consolidated corporation in this state as well as the state of New York, is thus conclusively established. There is, therefore, no occasion for the application in this case of that principle of law which estops a party who has contracted with another as a corporation from denying the legal existence of the latter as a corporation.

The effect of the consolidation has already been stated. As declared by the New York law, it was to transfer to, and vest in, the consolidated corporation, without further act or deed, all and singular the rights, privileges, exemptions and franchises of each of the corporations parties to the same, and all their property, real, personal and mixed, and all debts due on whatever account to either of those corporations. As declared by the Connecticut law, the effect of the consolidation was to confer upon and give to the new corporation in this state all the rights, powers, privileges, exemptions, franchises and property possessed, on the 31st day of July, 1872, by the New York, Housatonic & Northern Railroad Company, one of the parties to the agreement of consolidation, in this state, or which had theretofore been conferred upon that corporation by the General Assembly of this state. This disposes of the claim of the plaintiffs in error

that the consolidation, if valid in New York by the laws thereof, did not and could not transfer to the new company the rights, franchises and property of the old company in this state, and shows that the claim rests upon no legal foundation whatever.

The next question is, whether the mortgage which is the subject of this litigation is a valid security for the payment of the bonds which it was executed to secure. This depends, of course, upon the laws of New York and of this state under which the instrument was professedly executed. By the laws of New York each of the corporations which formed the consolidated company was empowered, from time to time, to borrow such sums of money as might be necessary for completing and finishing or operating its railroad, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchises to secure the payment of any debt contracted by the company for the purposes aforesaid. And by an act of the General Assembly of this state passed July 12th, 1867, it was provided that in any mortgage of its property and franchises in the state of New York which the New York, Housatonic & Northern Railroad Company might make in conformity with the laws of that state, the said corporation might embrace and include any property, rights and franchises which it might possess in this state, and that any such mortgage should be deemed and held a good and valid mortgage, for the purposes therein expressed, of said property, rights and franchises of said corporation in this state, and should have the same operation and effect upon said property, rights and franchises of said corporation in this state as if said property, rights and franchises in this state were held and owned by said corporation in the state of New York and were so mortgaged in that state pursuant to the laws thereof by said corporation.

That these laws gave to the original New York, Housatonic & Northern Railroad Company full power and authority to mortgage its property and franchises in this state as well as in the state of New York, to secure the payment of such sum or sums of money borrowed as might be necessary for com-

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pleting and finishing or operating its railroad, counsel for the plaintiffs in error admit. But they deny that the consolidated company had any such power. It has, however, been shown that the effect of the consolidation was to confer upon, and give to, the consolidated company in this state, all the rights, powers, privileges, exemptions, franchises and property possessed by the original New York, Housatonic & Northern Railroad Company in this state on the 31st day of July, 1872; and this, of course, included the power of borrowing money and mortgaging the property and franchises of the corporation in this state to secure its payment. The mortgage was, therefore, a valid security for the purposes for which it was executed, and operated as a lien upon the franchises as well as upon the real and personal property which became vested in the consolidated corporation by the agreement and act of consolidation.

But it is said by the plaintiffs in error that it is not averred in the bill of the plaintiffs below, and was not proved at the hearing, that the bonds mentioned in the condition of the mortgage were used for a lawful purpose. The bill however alleges that the respondent corporation, the mortgagors, did duly make, issue, sell, dispose of and deliver to divers persons a large number of said bonds, and that by such sale and delivery many persons who received the said bonds became, were and still are the *bond fide* holders and owners thereof and entitled to receive the moneys by said bonds agreed to be paid respectively, according to the tenor of said bonds, and entitled also to the benefit of said mortgage. And it is found by the court that all of the bonds provided for in the mortgage were duly executed, issued and delivered in different amounts to different persons for valuable considerations received by said corporation therefor—a portion of said bonds, amounting to about \$600,000, being issued and used in exchange for, and for the taking up of, the same amount of bonds then outstanding, which had been issued under and secured by a mortgage of the original New York, Housatonic & Northern Railroad Company. And it is further found by the court that all the allegations of the said bill, except so

far as any of them are inconsistent with the facts found to be true, are true. These allegations and findings, considered in connection with the recitals in the mortgage deed, are sufficient to establish the claim of the defendants in error that the bonds were lawfully issued and used, and that the parties to whom they were issued and delivered, and in whose hands they were at the time of the commencement of the suit in the court below, were *bonâ fide* holders of them for value, and as such are entitled to the benefit of the security which the mortgage was designed to afford.

It is further claimed by the plaintiffs in error that the Superior Court had no jurisdiction of the subject matter of the bill upon which the decree complained of was passed, because by the act of the General Assembly of 1867 this state transferred its jurisdiction to the courts of the state of New York. But this claim cannot be sustained. The courts of New York might, perhaps, have taken jurisdiction of a bill brought by the petitioners for the foreclosure of the mortgaged premises and passed a decree which would have been operative upon that portion of the premises which is situated in this state as well as that portion which is situated in the state of New York. In *Toller v. Carteret*, 2 Vern., 495, where a bill was filed by the mortgagee for the foreclosure of the Island of Sark, the defendant pleaded to the jurisdiction of the court, that the Island of Sark was part of the Duchy of Normandy and had laws of its own, and was not under the jurisdiction of the English Court of Chancery. But the Lord Keeper overruled the plea, observing that the Court of Chancery had jurisdiction, "the defendant being served with process here." And it is a principle firmly established that equity, as it acts primarily *in personam* and not merely *in rem*, may, where a person against whom relief is sought is within the jurisdiction, make a decree, upon the ground of a contract or an equity subsisting between the parties, respecting property situated out of the jurisdiction. *Penn v. Lord Baltimore*, 1 Ves., 444. But the circumstance that the courts of New York may have jurisdiction does not necessarily oust or deprive the courts of this state of jurisdiction over the

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same subject matter, and especially where the latter courts are applied to for relief before the jurisdiction of the courts of New York has attached. The courts of this state have jurisdiction of all cases affecting property located in this state, and of all suits for the foreclosure of mortgages of such property, unless the jurisdiction has been surrendered to other tribunals by the General Assembly. There is no act to be found among our statutes, (except, perhaps, acts ceding certain lands to the United States for federal purposes,) which can be construed as having such an effect. And it is very doubtful whether the General Assembly possess the constitutional authority to pass such an act.

The only remaining question which deserves serious consideration is, whether the plaintiff in error, King, by the levy of his execution upon the mortgaged premises, and setting off the same before the mortgage in the present suit was recorded in the towns of Danbury and Brookfield, obtained a priority of title over the unrecorded mortgage. King had actual knowledge and notice of the mortgage, and of the execution, issue and delivery of the bonds the payment of which it was made to secure, at the time of such execution, issue and delivery; and he knew at the time he attached the mortgaged premises in the suit in which he obtained the judgment and execution by virtue of which the premises were set off to him, that the mortgage and bonds were outstanding and unsatisfied. That suit was founded upon certain judgments which had been assigned to him, and in some of those judgments Rucker, the president of the respondent company, who executed the mortgage, had an interest, and to the extent of that interest the suit was brought by King as the agent of Rucker. Rucker of course had knowledge of the mortgage and of the bonds at the time they were executed, issued and delivered. The debts out of which the judgments arose were contracted afterwards. Had King or Rucker under such circumstances and with such knowledge purchased the mortgaged premises and taken a deed of them or had taken a mortgage of the premises to secure the payment of their debts, it is perfectly clear, and indeed is conceded by the

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counsel for the plaintiffs in error, that the mortgage upon which the present suit is founded, though unrecorded, would have been entitled to priority over the title acquired by their deed. No doctrine is better established than that the person who purchases an estate, though for a valuable consideration, after notice of a prior equitable right, makes himself a *malâ fide* purchaser, and will not be permitted, by getting in the legal estate, to defeat such prior equitable interest, but will be held to be a trustee for the benefit of the party whose right he has sought to defeat. *Le Neve v. Le Neve*, Amb., 436; 3 Atk., 646. But it is insisted by the plaintiffs in error that this doctrine, founded as it is upon the presumed fraud of the party becoming a purchaser under such circumstances, does not apply to attaching or execution creditors. The same claim was made in the case of *Carter v. Champion*, 8 Conn., 549, but it was left undecided. The court however held in that case that notice of an unrecorded deed, given to an attaching creditor of the grantor after his attachment and before the levy of his execution, could have no effect; for the creditor who had acquired a lien by his attachment could not be deprived of the effect of it by a subsequent act of another person. But it has been long settled in Massachusetts that a creditor who, with notice of a previous unregistered conveyance executed for a valuable consideration, attaches or levies upon the estate conveyed as the property of the grantor, conducts himself fraudulently, and therefore acquires by his attachment and levy no title against the grantee. *Prescott v. Heard*, 10 Mass., 60; *Priest v. Rice*, 1 Pick., 164; *Coffin v. Ray*, 1 Met., 212; *Curtis v. Mundy*, 3 Met., 405; *Pomeroy v. Stevens*, 11 Met., 244; *Lawrence v. Stratton*, 6 Cush., 167, 169; *Sibley v. Leffingwell*, 8 Allen, 584. And the same doctrine has been recognized by the courts of other states. *Daniels v. Sorrells*, 9 Ala., 436; *Dixon v. Lacoste*, 1 Sm. & Marsh., 70; *Taylor v. Echford*, 11 id., 21; *Walker v. Gilbert*, Freem. (Miss.) 85; *Morton v. Robards*, 4 Dana, 258. There are some authorities, however, which favor the doctrine contended for by counsel for the plaintiffs in error. But no doubt can be justly entertained that where, as in this case,

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a party with notice of an unregistered conveyance, absolute or by way of mortgage, gives credit to the grantor or mortgagor, and subsequently attaches or levies an execution upon the entire estate to secure the payment of the debt thus created, he does an act against good conscience and in abuse of the statute, which was made to prevent, not to protect fraud, and therefore will not be allowed to acquire by his attachment or levy, or both, a priority of title over the unregistered conveyance. In giving credit to the grantor or mortgagor, under such circumstances, the creditor does not rely upon the property embraced in the conveyance for the payment of his debt. He is not deceived or misled by the absence of the conveyance from the records, because he has all the notice which the records are designed to afford; and he suffers no wrong or injury from the application of the rule which puts him in the predicament of a subsequent purchaser with notice of a prior unregistered deed.

There is, therefore, no error in the decree of the Superior Court, and it is affirmed.

In this opinion the other judges concurred.

JOHN S. KING vs. THE HOUSATONIC RAILROAD COMPANY.

It is a well settled principle of the common law that the grant of the reversion of an estate expectant on the determination of a lease for years, passes to the grantee the rents reserved in the lease as incident to the reversion.

Since the statute of Anne, notice of the grant to the tenant has been sufficient in the English courts to entitle the grantee to demand and recover the rents.

And that rule has been adopted by the courts of this state, and by those of many of our sister states.

Where the grant of the reversion is by way of mortgage, the mortgagee, though entitled to the rents as incident to the reversion, may take them or not at his election. If he allows the mortgagor to receive them, and afterwards elects to take them himself, and gives notice of his election to the tenant, he becomes entitled to all the rents accruing after the execution of the mortgage and in arrear and unpaid at the time of the notice, as well as to those which accrue afterwards. But the rents in arrear at the time the mortgage was executed belong to the mortgagor

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A railroad company leased its road to another company for five years, and afterwards mortgaged the same property to trustees for the holders of certain bonds, the mortgage providing that the mortgagees, on default of the payment of the semi-annual interest on the bonds for six months, might enter and take possession of the property and receive the rents and income. The mortgagees entered for default of payment of interest, and gave notice to the lessees to pay to them all rents then due or thereafter accruing. At this time a large sum was due from the lessees for rent, and a few days after the entry a creditor of the lessors factorized the lessees as debtors of the lessors for the rents overdue. Held that these rents were not taken by the attachment, but belonged to the mortgagees.

SCIRE FACIAS, upon a process of foreign attachment; brought to the Superior Court in Fairfield County, and tried to the court on the general issue with notice, before *Beardsley, J.* The following facts were found by the court.

The New York, Housatonic & Northern Railroad Company, owning a railroad lying partly within this state and partly within the state of New York, on the first day of October, 1872, mortgaged all its corporate property and franchises to Erastus F. Mead and David S. Dunscomb, as trustees for the persons who might be holders of certain mortgage bonds, issued by the company and secured by the mortgage, to the amount of \$2,000,000. The property conveyed by the mortgage deed was thus described:—"All the corporate property and franchises of the said party of the first part, and also all and singular its railroad lying partly in the state of New York and partly in the state of Connecticut, constructed and to be constructed, real estate, rails, fences, bridges, depots, shops, tools, machinery, locomotives, engines, tenders, passenger, freight, baggage and hand cars, and apparatus and utensils of every kind whatsoever belonging to said party of the first part, or which shall hereafter be acquired by it." The principal of the bonds was payable October 1st, 1892, with interest payable semi-annually, and the mortgage contained the following provision with regard to defaults of payment:—"And it is further covenanted and agreed by the party of the first part that if any default shall be made in the payment of any of the said bonds above mentioned or the interest warrants or coupons that shall become due thereon, or any part thereof, and should the same remain unpaid and in arrear for the

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space of six months, then and from thenceforth, that is to say, after the lapse of the said six months, it shall be lawful for the said parties of the second part, their successors and assigns, to enter into and upon all and singular the property real and personal hereby granted or intended so to be and every part thereof, and to sell and dispose of the same, and all benefit and equity of redemption of the said party of the first part, its successors and assigns therein, at public auction according to law, giving due notice of the time and place of any such sale or sales. * * And the parties of the second part and their successors are hereby fully authorized and empowered, with the aid and assistance of any person or persons, to enter into and upon, and to take possession of, the railroad of the said party of the first part and its equipments, and all and singular the real and personal property hereinbefore mentioned or described, for the benefit of the holders of the said bonds so to be issued under this mortgage as aforesaid, to retain and keep possession thereof, and to use and operate the same, and receive the rents, issues, income and profits thereof for the purpose aforesaid, until a sale thereof as hereinbefore provided, or as may be decreed by a court of competent jurisdiction, rendering an account to the party of the first part, its successors or assigns, and paying the surplus moneys to arise therefrom, after paying all costs, charges and expenses, to or towards the principal or interest moneys due or to grow due on the said bonds or said taxes and assessments above specified."

On the 26th day of February, 1872, previous to the execution of the foregoing mortgage, the New York, Housatonic & Northern Railroad Company, by a lease in writing of that date, leased its railroad in this state to the Housatonic Railroad Company for the term of five years from March 1st, 1872, and thereupon the last named company took possession of that part of the road and has held possession of it ever since under the lease. Under this lease there was due to the New York, Housatonic & Northern Railroad Company from the Housatonic Railroad Company, on the 20th day of March, 1875, the sum of \$2,215.60 as rent under the lease.

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On that day the plaintiff brought a suit against the former company, to recover a debt of \$3,341 due him from that company, and factorized the latter company as the debtor of the former, intending thereby to attach the rent so due. The suit was prosecuted to final judgment, which was rendered in favor of the plaintiff against the New York, Housatonic & Northern Railroad Company for the above sum and costs of suit, upon which judgment due demand was made upon the garnishees and payment refused, and the present action of scire facias was thereupon brought against the Housatonic Railroad Company.

Previous to the service of the factorizing process upon the Housatonic Railroad Company, the New York, Housatonic & Northern Railroad Company had become, and had been for more than a year, largely in default in the payment of its interest coupons, and on the 15th of March, 1875, the trustees delivered to the Housatonic Railroad Company the following notice:

"To the Housatonic Railroad Company: You will take notice that default having been made in the payment of the coupons or interest warrants of the bonds issued by the New York, Housatonic & Northern Railroad Company secured to be paid by a mortgage executed by said company to us as trustees, bearing date October 1st, 1872, we do hereby, pursuant to the terms of said mortgage, require and demand of you the payment to us of any and all the rents and sums of money now due or owing, or which may hereafter be or become due and owing by you upon the lease or agreement held by you from said New York, Housatonic & Northern Railroad Company for the use and occupation of so much of its road-bed and property as has been or may hereafter be used or occupied by you, situated in the state of Connecticut. Dated New York, March 4th, 1875.

DAVID S. DUNCOMB, } Trustees."
ERASTUS F. MEAD, }

Upon these facts the court rendered judgment for the defendants, and the plaintiff brought the record before this court by a motion in error.

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A. S. Treat, with whom was *R. Averill*, for the plaintiff in error.

The question in this case is whether a mortgagee after notice of the mortgage to a tenant in possession under a lease made prior to the mortgage, is entitled to the rent as against an attaching creditor of the mortgagor. At common law he would not be. By the statute of Anne the common law was changed. In *Moss v. Gallimore*, 1 Douglass, 279, it was holden that a mortgagee after notice to a tenant under a prior lease was entitled to the rent. This decision was expressly based upon the statute. The statute never having been enacted in this state has as such no force here. Our ancestors expressly rejected the common law. 1 Colonial Records, 509; *Fitch v. Brainard*, 2 Day, 189; *Fish v. Fish*, 1 Conn., 559; *Card v. Grinman*, 5 id., 168; *Baldwin v. Walker*, 21 id., 181. In all the decided cases and in all the text-books where the doctrine claimed by the mortgagees here is laid down or recognized as law, the authority traced back leads to the case of *Moss v. Gallimore* and to no other. At common law livery of seizin or possession being essential, and a mortgagee being in possession by his tenant—in order to perfect the conveyance the tenant was required to attorn to the mortgagee. The possession of the tenant being the possession of the landlord, attornment being a change of landlords was a change of possession. But the statute provided “that all grants of reversions should be as good and effectual to *all intents and purposes*” without attornment as with. By mere force of the statute delivery of a deed became a delivery of possession, and the mortgagee of the reversion being in contemplation of law in possession was therefore entitled to the rent. The notice required by the statute was solely for the protection of the tenant, but conferred no rights on the mortgagee beyond the rights he had from his mortgage. In this state there is no distinction between a grant of a reversion and a grant of any other interest in real estate. A mortgagee in this state and in New York, where this mortgage was made, takes the interest in lands conveyed by the mortgage (be it a reversion or whatever it may be) merely as

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security, leaving the ownership for all other purposes in the mortgagor. *Leonard v. Bosworth*, 4 Conn., 421; *Huntington v. Smith*, id., 235; *Clark v. Beach*, 6 id., 150; *Toby v. Reed*, 9 id., 224; *Cooper v. Davis*, 15 id., 556; *Packer v. Rochester & Syracuse R. R. Co.*, 17 N. York, 283; *Power v. Lester*, 23 id., 527; *Trimm v. Marsh*, 54 id., 599. A mortgagor in possession is as regards the rents and profits the real owner. *Lacon v. Davenport*, 16 Conn., 341; *Bank of Ogdensburg v. Arnold*, 5 Paige, 38; *Astor v. Turner*, 11 id., 436; *Clason v. Corley*, 5 Sandf., 447, 454; *Cheney v. Woodruff*, 45 N. York, 98; *Mitchell v. Bartlett*, 51 id., 447; *Galveston R. R. Co. v. Cowdrey*, 11 Wall., 459; *Gilman v. Illinois & Miss. Telegraph Co.*, 91 U. S. Reps., 603. In *Am. Bridge Co. v. Heidelberg*, 94 U. S. Reps., 798, it was holden that mortgagees are not entitled to rent until possession is taken under the mortgage and then only from the time possession is taken. But the defendants claim that mortgagees of reversions are an exception to the rule. No reason however can be given why one mortgagee should be preferred to another. No case can be found where it has been holden that a mortgagee of a reversion could recover rent without an attornment or something by statute expressly made equivalent thereto. "A mortgagee of a reversion is entitled to rent after notice, but cannot recover it by suit unless the lessee has attorned." 2 Swift Dig., 292; 1 Smith Leading Cases, 697; 4 Kent Com., 166; *Baldwin v. Walker*, 21 Conn., 181. In the last case, which was an action by a mortgagee of a reversion, the tenant Walker, before any rent became due upon notice promised to pay it to the plaintiff; not doing so the plaintiff brought his suit and alleged an attornment, which the defendant denied. This question of fact was tried by the parties and committed to the jury in the charge of the court. The plaintiff recovered because the jury found an attornment. No question was made about the effect of the notice. Here the defendants claim the rent by virtue of their notice, without any attornment. "Rent is incident to reversion;" true—so are rents and profits incident to title, but neither are incident to mortgages. The mortgage itself provides that the trustees

may take possession and then "receive the rents, &c." Possession is indispensable. If these mortgagees claim possession how did they obtain it? By deed? Surely not; titles are conveyed in this state by deed, but not possession. By their notice? Hardly; possession is not taken with paper.

H. B. Harrison and W. K. Seeley, for defendants in error, cited *Barber v. Hartford Bank*, 9 Conn., 409; *Peck v. Northrop*, 17 id., 216, 219; *Baldwin v. Walker*, 21 id., 168, 179, 182; *Smyth v. Ripley*, 33 id., 310; *Harris v. Phoenix Ins. Co.*, 35 id., 310; *Mitchell v. Winslow*, 2 Story, 639; *Newall v. Wright*, 3 Mass., 153; *Fitchburg Cotton Manuf. Co. v. Melven*, 15 id., 268; *Burden v. Thayer*, 3 Met., 76, 79; *Russell v. Allen*, 2 Allen, 42; *Kimball v. Lockwood*, 6 R. Isl., 138; *Seymour v. Canandaigua & Niagara Falls R. R. Co.*, 25 Barb., 284, 302; *Field v. Mayor &c. of New York*, 6 N. York, 179; *Galena &c. R. R. Co. v. Menzies*, 26 Ill., 121; *Dunham v. Isett*, 15 Iowa, 284; *Pope v. Briggs*, 9 Barn. & Cress., 245; 2 Redf. on Railways, 3d ed., 537 to 547 and notes; 1 Smith's Lead. Cas., (H. & W. ed.,) 595 to 606; 1 Washb. R. Prop., book 1, ch. 16, sec. 4, art. 29; Taylor's Landlord & Tenant, § 119.

HOVEY, J. The proceedings below were upon a *scire facias*, to recover certain rents due from the defendants as lessees of the New York, Housatonic & Northern Railroad Company. The lease reserving the rents was executed on the 26th day of February, 1872, and was for the term of five years from the 1st day of March then next, when the defendants entered into possession under the lease. Subsequently, on or about the first day of October, 1872, the lessors, being the owners of the leased premises, mortgaged the same, with other property situate in the state of New York, to secure the payment of certain bonds of the mortgagors, amounting to the sum of two million dollars, to David S. Dunscomb and Erastus F. Mead, as trustees for those who might become holders of the bonds. The principal of the bonds was made payable on the first day of October, 1892, and the interest semi-annually on

the first day of April and the first day of October in each year, upon the presentation and surrender of the interest warrants or coupons which were annexed to the bonds. And the mortgage expressly authorized the mortgagees, after six months' default in the payment of interest, to enter into and take possession of the property mortgaged and receive the rents, income and profits thereof. Soon after the execution of the mortgage the bonds passed into the hands of *bonâ fide* holders for value, and still remain outstanding and unpaid. The mortgagors having made default in the payment of interest more than six months prior to the 15th day of March, 1875, and interest to a large amount being then due and unpaid, the mortgagees on that day gave notice thereof to the defendants and demanded of them the rents then due and thereafter to become due under their lease. Five days afterwards the plaintiff commenced a suit by foreign attachment against the mortgagors, the New York, Housatonic and Northern Railroad Company, and attached the rents then due, amounting to the sum of \$2,215.60. In that suit the plaintiff recovered judgment, took out execution, placed the execution in the hands of a proper officer, and the officer, by virtue of the execution, on the 23d day of December, 1875, made demand of the present defendants of the sums contained in the execution and of any estate of the New York, Housatonic and Northern Railroad Company in their hands, but the defendants refused to comply with the demand. And on the 21st day of February, 1876, the suit upon which the proceedings below were had was brought. The court below rendered judgment in favor of the defendants; and the question is whether in so doing the court erred.

It is a well settled principle of the common law that the grant of the reversion of an estate expectant on the determination of a lease for years, passes to the grantee the rents reserved in the lease as incident to the reversion. Co. Litt., 151, 152; 2 Bl. Comm., 176; 4 Kent, 354. The consent of the tenant, expressed by what was called his attornment, was, however, necessary to the perfection of the grant in England, until the fourth year of the reign of Queen Anne; but in that

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year a statute was passed which made the grant effectual without attornment. And since that time notice of the grant to the tenant has been sufficient to entitle the grantee to demand and recover the rents. *Birch v. Wright*, 1 T. R., 384; *Lumley v. Hodgson*, 16 East, 99.

Where the grant is by way of mortgage, the mortgagee, though entitled to the rents as incident to the reversion, may take them or not at his election. If he elects not to take them, as he generally does so long as his interest is paid, he may forbear to give notice to the tenant, and in that case the mortgagor is authorized to collect the rents and appropriate them to his own use. But if the mortgagee elects to take the rents and gives notice of his election to the tenant, he then becomes entitled to all the rents accruing after the execution of the mortgage and in arrear and unpaid at the time of the notice, as well as to those which accrue afterwards. But the rents in arrear at the time the mortgage was executed belong to the mortgagor. The leading authority for this doctrine is the case of *Moss v. Gallimore*, Doug., 279. The decision in that case seems to have settled the law in England. 2 Cruise Dig., 84; *Birch v. Wright*, supra; *Trent v. Hunt*, 9 Exch., 14. And its soundness, in view of the relations of a mortgagor and mortgagee of a reversion to each other and to a tenant in possession under a lease prior to the mortgage, cannot well be questioned. In commenting upon the decision, the learned English editor of Smith's Leading Cases observes that it "is upon a point which seems so clear in principle that, were it not for its general importance, it would, perhaps, be matter of surprise that any case should have been deemed requisite to establish it." 1 Smith's Lead. Cas., 693. It is true, as suggested by counsel for the plaintiff, that the court, in making that decision, was governed by the provisions of the statute of Anne. But the principle embodied in that statute, and enforced in the case of *Moss v. Gallimore*, has been adopted by the courts of last resort in many of our sister states (4 Kent, 165); and was expressly sanctioned and approved by this court in the case of *Baldwin v. Walker*, 21 Conn., 168. In that case one Stoddard, being the owner of

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an undivided half of certain real estate, leased it to the defendant for a term of years and afterwards mortgaged it to the plaintiff. The defendant had notice of the mortgage, but refused to pay to the plaintiff the rent due under the lease; and the plaintiff sued in an action of covenant to recover it, and judgment was rendered in his favor. The case then came to this court upon a motion for a new trial, and also upon a motion in error. Both motions were unsuccessful, and the judgment below was affirmed. CHURCH, C. J., in giving the opinion of the court, after referring to the lease, and declaring that as between Stoddard the lessor and the defendant the lease must be treated as an effective one and as leaving when made a reversion in Stoddard, says:—"By his mortgage to the plaintiff this reversion, as a subsisting legal interest, was conveyed or assigned to the plaintiff, unless he elected to treat it as void. This he has not done, but claims, as he may, his right as mortgagee or assignee to the rent incident to such reversion;" citing 2 Cruise's Dig., 111; *Moss v. Gallimore*, Doug., 279; 2 Swift Dig., 179; *Fitchburg Manuf'g Co. v. Melvin*, 15 Mass., 268. The learned judge then observes that, "if the lease had been executed *after* the mortgage to the plaintiff, he could not as mortgagee, perhaps, have any remedy for the recovery of this rent, without attornment, for want of legal priority." That case is decisive of the one at bar and fully sustains the court below in the judgment which it rendered in favor of the defendants. The judgment must, therefore, be affirmed.

In this opinion the other judges concurred.

**EUGENE WARD vs. WILLIAM J. DICK.**

In an action for slander in charging the plaintiff with dishonesty, the defendant, for the purpose of lessening the damages, offered evidence of the plaintiff's bad reputation in that respect. The court limited him to ten witnesses. Held to be a ground for granting a new trial

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ACTION FOR SLANDER, brought to the Superior Court in Fairfield County, and tried to the jury before *Beardsley, J.* Verdict for the plaintiff and motion for a new trial by the defendant. The case is sufficiently stated in the opinion.

A. S. Treat and *W. F. Taylor*, in support of the motion.

G. Stoddard, contra.

PARDEE, J. This is an action for slander in imputing dishonesty to the plaintiff.

After proof of the speaking of the defamatory words had been made, the defendant, for the purpose of lessening the damages, offered evidence tending to prove that before the speaking the plaintiff's reputation for honesty was below that of men in general; the court limited him to ten witnesses upon that point; the plaintiff had a verdict for \$1,000, and the defendant complains of the restriction.

The subject matter of the inquiry was the value of a reputation. To the law this is a tangible thing; it is property in the highest sense; and we are not aware that in actions for injuries to property courts have assumed the right, either to prevent the plaintiff from establishing the value thereof at the highest possible point to which he could carry it by the power of testimony, or the defendant from diminishing it by the same means; and actions for injuries to character are not exceptions.

It is true that in *Bunnell v. Butler*, 23 Conn., 65, this court sanctioned a limitation upon the number of witnesses to be heard in the matter of the impeachment of the character of a witness for truth; but that character was not the ground of the action. It could at most only affect the weight to be given to the testimony of one witness; and he may have been one of many to the same point, and not at all essential to the support of that; and the point, if established, may have been of very little importance. And in other instances courts have restricted the number of witnesses giving opinions upon matters collateral to the main issue. Character, for the purposes of a judicial investigation, is the aggregate of opinions

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expressed concerning an individual by those who know him; and a name good or bad is most firmly established where the testimony of credible witnesses covers the widest range of the life of the person who bears it. Therefore, where as in the case before us the life of the plaintiff has been broken into sections by changes of residence from one locality to another, the defendant was entitled to the privilege of showing that in each there was a preponderance of opinion adverse to his good name. Again, it may often happen that a few only can be found on the one hand to sustain or on the other to disparage the name of an individual, while the great body of opinion is in each case on the other side. In such instances the effect of a limitation is to render it easy for the few to make it appear to the jury that public opinion rests at the equipoise upon the name in question, when the fact is quite otherwise.

We know no better rule than to allow the party holding the weight of evidence an opportunity to bring it to bear upon the jury, when it concerns the real issue. Moreover, we think there is no necessity for the exercise of restrictive power in such cases; usually a suggestion from the court will be as effective as an order.

There should be a new trial.

In this opinion the other judges concurred.

WILLIAM HORTON *vs.* THE TOWNS OF NORWALK AND WILTON.

Upon a hearing of a highway petition before a committee the petitioner offered, under the statute, a bond purporting to bind the obligors to construct the road for a sum named. The respondents objected to it as inadmissible, and the counsel for the petitioners thereupon stated that if upon examination of the statute, which was not then at hand, it should be found that the bond did not conform to the statute, they should claim the right to amend it. The respondents did not assent to this, but the committee received the bond and consented that it might be amended if necessary; but finally became satisfied on examination of the statute that it was not admissible, and laid it out of the case. After the close of the hearing, at a subsequent day, the petitioner's counsel

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sent the committee a new bond which was drawn in conformity with the statute, and they received it and considered it in their determination of the case; it being sent and received without the knowledge of the respondents. Held that the receiving of it was not in the circumstances "irregular and improper conduct" on the part of the committee.

PETITION for the laying out of a highway in the towns of Norwalk and Wilton, brought to the Superior Court in Fairfield County. A committee reported that the highway prayed for was of common convenience and necessity and laid out the same; the respondents remonstrated against the acceptance of the report; the court (*Sanford, J.*) over-ruled the remonstrance and accepted the report, and the respondents moved for a new trial for error in the decision of the court in so doing. The case is fully stated in the opinion.

W. R. Smith, in support of the motion.

W. K. Seeley, contra.

CARPENTER, J. This case comes before us in the form of a motion for a new trial. The motion shows that upon the trial before the committee, upon the question as to the "common convenience and necessity" of the highway prayed for, the petitioner, pursuant to the statute,* for the purpose of proving the probable expense of the proposed highway, offered in evidence a bond purporting to bind the obligors to construct the highway for a given sum. The respondents objected to the bond as irrelevant and inadmissible. The petitioner's

* The statute referred to is as follows (Gen. Statutes, tit. 16, ch. 7, sec. 47):

"When an application shall be pending before the Superior Court for the laying out or alteration of any highway, any person interested therein may execute a penal bond with surety, payable to the defendant town or towns, conditioned that the obligors will, for a specified sum, make or alter such highway in a specified time and manner, or convey to said town or towns the right of way therefor; which bond shall be executed by persons owning real estate in fee simple, situated in this state, in value double the amount of the penal sum in such bond, and shall be binding upon the obligors therein to the full amount of such penal sum, as liquidated damages; and the committee may receive and hold it until they shall report their doings to said court, and regard it as evidence in determining the expense of constructing or altering such highway; and if they report favorably upon such application, shall deliver said bond to said town or towns, otherwise to the obligors therein named."

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counsel thereupon stated that if upon examination of the statute, (no copy of which was then at hand,) it should be found that the bond did not conform thereto, he should claim the right to amend it. The counsel for the respondents did not consent to this, but reiterated their objection to the reception of the bond.

The committee received the bond in evidence, but consented that the petitioner should have the privilege of amending it if found to be not in conformity with the statute, or of filing a bond which should conform to the provisions of the statute. The committee subsequently satisfied themselves by an examination of the statute that the bond was not admissible, and did not consider it as evidence in the case. It remained in the hands of the committee and no announcement was ever made to the respondents' counsel, nor did they know, that the bond was rejected by the committee.

After the trial was closed, at a subsequent day, the petitioners sent to the committee by mail a bond which did conform to the statute and which the committee received and considered as evidence.

The last named bond was sent to the committee, received by them, and used as evidence in the case, without the knowledge or consent of the respondents' counsel. On this ground the respondents claim a new trial.

The question of course is, whether the conduct of the committee in this respect was "irregular and improper." If it gave to the petitioner an unfair advantage to the prejudice of the respondents, it was irregular and improper. Otherwise, if the petitioner only received what he was entitled to and the respondents had a fair and reasonable opportunity to meet it and refute or explain it.

There is no claim that the bond last offered and received was not in all respects such as the statute required. That the petitioner had a right to the benefit of such a bond as evidence is indisputable. Such right is in terms secured to him by statute. He therefore received only what he was justly entitled to.

Were the respondents thereby legally prejudiced? We

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think not. The petitioner in the presence of the respondents and their counsel proposed that he should have the privilege, if necessary, of sending to the committee such a bond. This was an open and fair proposition. The motion states that the respondents' counsel did not consent to it. But it does not appear that they made any objection. It may be conceded for the purposes of this case that they had a right to object, and to insist that such bond, if received at all, should be received before the evidence was closed, and that they should be permitted to examine it, and take exception to it, or meet it in any way they might think proper.

If they had made objection and claimed this right expressly, it is not to be presumed that the committee would have denied it. But no such objection being made we think the committee might fairly consider it as a matter within their discretion. We also think that the respondents have no reason to complain of the exercise of that discretion. A specific objection might, as we have already suggested, have resulted in a different course. Moreover, it does not now appear that the respondents could have made any answer to the bond, or in any other way could have counteracted its effect.

The respondents had fair notice of the proposition to offer this piece of evidence at the time and in the manner it was offered; the committee in their presence assented to the proposition; the respondents then and thereafter acquiesced in it, and now it does not appear that they were thereby prejudiced.

A new trial therefore should be denied.

In this opinion the other judges concurred.

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 Sanford v. Thorp.

ALBERT W. SANFORD, JUDGE OF PROBATE, vs. WILLIAM H. THORP AND ANOTHER.

45	241
60	380
45	241
63	307

It is the duty of an executor to apply to the court of probate, within a reasonable time after the settlement of his administration account, for an order of distribution; and where property is lost by his neglect to do this, he is chargeable with the loss.

Where certain facts are found in a case, for the proof of which no foundation has been laid by any allegations in the declaration or pleadings, they ought to be laid out of the case in rendering judgment.

DEBT on a probate bond, brought to the Superior Court in Fairfield County, and tried to the court on the general issue with notice. Facts found and case reserved for advice. The case is sufficiently stated in the opinion.

W. Hamersley, for the plaintiff.

I. M. Bullock and *C. M. Gilman*, for the defendants.

PARK, C. J. The question in this case relates to the damages the party in interest in this suit is entitled to recover. It appears that on the 17th day of June, 1870, the defendant William H. Thorp, executor of the last will of Henry S. Thorp, deceased, settled his account as executor with the court of probate, and there was found remaining in his hands as executor the sum of \$15,493.87 in cash. Of this amount Caroline E. Hermann, the party for whose benefit this suit is brought, and who is one of the legatees of the will of Henry S. Thorp, was entitled to receive one-ninth of two-thirds.

It was the duty of the defendant, as executor, to apply to the court of probate, within a reasonable time after the settlement of his account, for an order of distribution of the property remaining in his hands as executor, and to pay or distribute the same to the parties entitled under the will.

Warren v. Powers, 5 Conn., 373; *Rouland v. Isaacs*, 15 Conn., 115; *Davenport v. Richards*, 16 Conn., 310. He neglected to do so, and in consequence of his neglect the cash remaining in his hands as executor became lost to the estate,

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and the proportional part of the same, which the said Caroline was entitled to receive, became lost to her.

If there was nothing more in the case it would be clear that the plaintiff should recover, for the benefit of the said Caroline, one-ninth of two-thirds of the amount of cash remaining in the executor's hands at the time of the settlement of his account, with the interest thereon. But it is said that, nearly four years after the settlement of the executor's account, and after the commencement of this suit, the court of probate ordered distribution of the assets specified in the executor's account to be made, and worthless claims were distributed to the said Caroline in accordance with the order. This order of the court of probate was not appealed from, and consequently it remains unreversed; and now, it is said, it offers an effectual barrier to the plaintiff's recovery of a greater sum than that specified in the order. It is difficult to see how the facts relating to the order of the court of probate and the distribution of the worthless claims to the said Caroline came into the case. No foundation was laid for their admission by the pleading of the parties. Indeed the subject is nowhere suggested on the record. The plea of the defendants is the general issue, which is a general denial of all the material allegations of the plaintiff's declaration. But the declaration does not mention the subject. In fact, at the time it was served, no such order had been made. The notice of the defendants under the general issue sets forth merely an accord and satisfaction, (which was not proved,) and does not allude to any order of distribution. It is very clear that, before such facts could legitimately be brought into the case, foundation must be laid for their admission by the pleadings of the parties. This would be true at the common law; but the statute requires that notice shall be given of such matters of defence as are consistent with the material allegations of the plaintiff's declaration. These facts are so consistent; hence notice of them was necessary under the general issue. These facts, therefore, would not be included in any judgment which may be rendered in the case, for a judgment is co-extensive only with the pleadings and notice between the

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parties, and is conclusive only upon the matters necessarily involved and included in them. *Coit v. Tracy*, 8 Conn., 268; *Dickinson v. Hayes*, 31 Conn., 417.

On this illegitimate ground alone the defendants seek to deprive the party in interest in this suit of nearly all the damages which manifestly she is equitably entitled to receive. Ordinarily we might not notice the irregularity, inasmuch as it does not appear that the plaintiff objected to the reception of the evidence relating to the order and distribution, but the order is so flagrantly unjust and inequitable that we feel bound to treat it as no part of the case. In contemplation of law the executor had in his hands, at the time the order was made, more than fifteen thousand dollars in cash, belonging to the estate. The party for whose benefit this suit was brought was entitled to receive more than eleven hundred dollars of the amount, but the order directed distribution to be made to her of only three hundred and sixty dollars, and the remainder of the order directed distribution of assets to her which were worthless at the time, and worthless when the executor settled his account. This was manifestly unjust.

We think the plaintiff should recover for the benefit of the said Caroline one-ninth of two-thirds of the sum of \$15,493.87, with the interest thereon from the time the defendant William H. Thorp settled his account as executor of the estate; and we so advise.

In this opinion the other judges concurred.

PATRICK BURKE vs. PATRICK MELVIN.

In trespass for an assault the provocation given by the plaintiff, though offered in evidence in justification of the assault, may yet, if insufficient for this purpose, be considered by the jury in mitigation of damages.

And it makes no difference that the plea is the general issue, with notice only that the facts would be proved as a justification.

The whole case, with all its circumstances, is to go before the jury, to be considered by them in fixing the damages.

Burke v. Melvin.

TRESPASS for an assault, brought, by appeal from a justice of the peace, to the Court of Common Pleas of Fairfield County, and tried to the jury on the general issue, with notice that the act was done in self-defence, before *De Forest, J.*

On the trial the plaintiff offered evidence to prove the facts charged.

The defendant claimed, and offered evidence to prove, that early in the morning of the day when the assault complained of was committed, the plaintiff commenced to menace and assault him and to challenge him to fight with him; that he kept up this attack upon the defendant for several hours, and up to the time of the assault; that the plaintiff finally struck him, and that then, apprehending great and immediate bodily violence from the plaintiff, he struck him in self-defence. This evidence of the defendant and his witnesses was all denied by the plaintiff.

The counsel for the defendant, during their arguments to the court and jury claimed as matter of law, and that the court should charge the jury, that long, continuous and extreme provocation given by the plaintiff should be considered by the jury in mitigation of damages. They did not however request the court in writing so to charge, and did not either during the charge, or at the close of it, call the attention of the court to this point.

The court omitted to charge the jury on the subject of mitigation of damages, but charged them that if the defendant used no more violence towards the plaintiff than was necessary for his self-defence, he was justified, and the verdict should be for the defendant. But that if he assaulted the plaintiff and used more force in so doing than was necessary for self-defence he would be liable in damages; that if the jury found that the defendant used more than necessary force, but did not act wantonly or maliciously, they should give only the amount of damages actually suffered by the plaintiff; but that if they found that he used unnecessary force, and wantonly and maliciously assaulted and beat the plaintiff, then they might give exemplary damages, and that in so doing they might consider the expense of the plaintiff, over and

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above his taxable costs in prosecuting the suit, and that they might give such an amount of exemplary damages as they deemed just, limited only by the jurisdiction of the court.

The jury returned a verdict for the plaintiff, and the defendant moved for a new trial for the error of the court in omitting to charge as requested with regard to mitigation of damages.

L. D. Brewster and *W. Burke*, in support of the motion.

T. McDonald, contra.

PARK, C. J. The question in this case arises upon the omission of the court to charge the jury, as requested by the defendant, "that long, continuous and extreme provocation given by the plaintiff should be considered in mitigation of damages." The defendant claimed to have proved that early in the morning of the day when the assault complained of was committed, the plaintiff began to threaten and assault him, and challenged him to fight; that the plaintiff kept this up for several hours, and up to the time of the assault complained of, and finally struck him; and that he, apprehending great and immediate bodily violence from the plaintiff, struck him in self-defence.

It appears by the motion that the evidence was claimed by the defendant to be admissible, first, in justification of the assault, on the principle of self-defence, and secondly, in mitigation of the damages, if it should fall short of establishing a full defence.

It is claimed by the plaintiff that as the notice under the plea of the general issue is confined to a proof that the assault was committed in necessary self-defence, and the evidence was offered in justification of the assault, it can not be used for the further purpose of mitigating the damages. But the evidence was admissible for that purpose under the general issue without notice, and the fact that it was used as a justification is no reason why it should not also be considered by the jury in determining the damages. It appears by the motion that the evidence tended to prove a continuous

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affray from early in the morning till it ended in the assault of the defendant several hours afterwards; that it was all one transaction. If such was the fact, and for the purposes of this case it must be so regarded, then clearly the jury were bound to consider the whole transaction in determining one or the other or both of these questions. They could not ascertain what amount of damage the plaintiff was entitled to receive by considering a part of the transaction. They must look at the whole of it. They must ascertain how far the plaintiff was in fault, if in fault at all, and how far the defendant, and give damages accordingly. The difference between a provoked and unprovoked assault is obvious. The latter would deserve punishment beyond the actual damage, while the damage in the other case would be attributable, in a great measure, to the misconduct of the plaintiff himself.

We think the court should have charged the jury as requested by the defendant, and we therefore advise a new trial.

In this opinion the other judges concurred.



GEORGE W. HAYES vs. JACOB WERNER.

While a negotiable note payable on demand is by statute dishonored at the end of four months if not paid, yet where such a note is on annual or semi annual interest, it will be presumed, in the absence of evidence to the contrary, that the endorser made his endorsement with no expectation that demand of payment would be made at the end of four months, and therefore with a waiver of such demand.

The taking of security by the endorser at the time of the endorsement is not in itself a waiver of demand and notice, but it is evidence of it, and goes to fortify the presumption arising on the face of the note.

Where such an endorser afterwards promised to pay the note, not knowing at the time that demand had not been made, but with no reason to suppose that it had and in a state of indifference on the subject, it was held that, if not in itself a waiver of such demand, it was strong evidence of an intention at the time of the endorsement to waive demand, and went strongly to fortify the presumption arising on the face of the note.

45	246
68	88
45	946
71	42

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ASSUMPSIT against the defendant as endorser of a promissory note; brought to the Superior Court in Fairfield County, and tried to the court, on the general issue, with notice. The following facts were found by the court:—

The plaintiff, on the 22d day of May, 1871, loaned the sum of \$2,000 to C. M. Noble & Company, a copartnership consisting of C. M. Noble and William H. Noble, both of the town of Bridgeport, in Fairfield County, taking the following note therefor:—

“\$2,000. Bridgeport, May 22d, 1871. On demand after date we promise to pay to the order of Jacob Werner two thousand dollars, with interest semi-annually, value received.

C. M. NOBLE & Co.”

The note was endorsed by Werner the defendant, and David W. Sherwood.

At the time of the making of the loan and the giving of the note it was agreed between the plaintiff and the makers that it should be secured by the endorsement of the defendant and said Sherwood. And the plaintiff was at the same time informed by the makers that the defendant was amply secured for his endorsement by a mortgage made to him for that purpose, of certain real estate, by William H. Noble, and was at the same time shown by Noble the mortgage as it appeared on record in the office of the town clerk, and he made the loan believing that the defendant was secured for his endorsement by the mortgage.

The makers paid the interest on the note for the year ending May 22, 1872, and afterwards on the 8th day of June, 1872, became bankrupt, and were subsequently discharged from their debts under the provisions of the bankrupt act of the United States.

The plaintiff proved the note against their bankrupt estate and received a dividend thereon, which is endorsed on the note. He did not, within four months from the date of the note, demand payment of the same from the makers.

After the bankruptcy of the makers, in June, 1872, the plaintiff demanded payment of the note of the defendant, who then promised him that he would pay the same. This

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promise was made by the defendant without any knowledge that no demand had been made upon the makers, but no notice of such demand had been given to him, and he had no reason to believe that any demand had been made, and did not care to know whether any demand had or not been made, for the reason that, in his view, it was immaterial as to his liability to pay the note.

The plaintiff offered evidence to prove the fact that the defendant, at the time of making the endorsement was, and to the time of bringing the suit continued to be, amply secured for his liability as endorser by a good and valid mortgage of real estate situated in Bridgeport, made by W. H. Noble to him before the endorsement. To this evidence the defendant objected.

The questions whether this evidence was admissible, and what judgment upon the facts found should be rendered, were reserved for the advice of this court.

W. K. Seeley, for the plaintiff.

1. The defendant, after the note became due, promised the plaintiff to pay it. This promise was a waiver of demand and notice. Our court has recently settled the law upon this subject in *Rhodes v. Seymour*, 36 Conn., 7. The Supreme Court of the United States has also adopted the same rule. *Sigerson v. Matthews*, 20 How., 500; *Yeager v. Farwell*, 13 Wall., 12. See also *Breed v. Hillhouse*, 7 Conn., 528; *Hopkins v. Liswell*, 12 Mass., 52; *Lundie v. Robertson*, 7 East, 231.

2. It was not necessary that the defendant should have known, when he made the promise, that no demand had been made upon the makers when the note fell due. The case of *Low v. Howard*, 11 Cush., 268, cited in the defendant's brief, has no foundation in sound legal reason nor in good sense. The defendant knew, when he made his promise, that the note had not been paid, and that no notice of demand and non-payment had been given him. Whether demand had been made upon the makers or not was wholly immaterial to the defendant. He knew that he was discharged by want of

notice of non-payment, and the fact whether a fruitless demand had or not been made upon the makers could in no possible way affect him. The only logical, sensible and just rule is stated with admirable terseness in 2 Daniel on Neg. Instruments, § 1150, "that a distinct promise to pay, made after maturity, is conclusive evidence that there was due demand and notice, which the promisor is estopped to rebut." The fact that the decisions in the different states of this country are so variant from each other that it is impossible to find any principle upon which they are agreed, furnishes an excellent reason why our court should adhere to our rule.

3. The court finds that the defendant had no reason to believe that any demand had been made of the makers, and that he did not care to know. The promise of payment, made upon this state of facts, was as much a waiver of the demand as though he had positive knowledge of the fact that no demand was made.

4. The evidence offered to show that the defendant had received, at the time of endorsing, security for his endorsement, was admissible. By receiving security to meet the endorsement he waived both demand and notice of non-payment. *Prentiss v. Danielson*, 5 Conn., 180; *Bond v. Farnham*, 5 Mass., 170; *Tower v. Durell*, 9 id., 332; *Corney v. Da Costa*, 1 Esp., 302; *Barton v. Baker*, 1 Serg. & R., 334. The distinction between the case at bar and the case of *Holland v. Turner*, 10 Conn., 316, is, that in that case the security was taken after the endorsement, while in this case it was taken at the time of making the endorsement.

H. S. Sanford and *W. R. Shelton*, for the defendant.

Two distinct steps are necessary to fix the endorser of negotiable paper—demand on the maker at maturity, and notice of dishonor to the endorser in due season. These two steps are independent and equally indispensable. Neither can be omitted, though either or both may be *waived* in a proper manner. 2 Greenl. Ev., (18th ed.,) § 190. In *Backus v. Shepherd*, 11 Wend., 629, Judge Nelson declares that a waiver of notice will not amount to a waiver of

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demand. The converse follows of course, that a waiver of demand will not amount to a waiver of such notice. This record discloses no notice of dishonor—no waiver of such notice. It will not do for the plaintiff to say that the demand on the defendant, allied with his promise to pay the note, constitutes a waiver. All authorities agree that there can be, by law, no valid waiver by a promise to pay, unless the endorser when he makes the promise has *full knowledge of the omission* which his waiver is claimed to cure. But no such knowledge is shown in this finding. It is not sufficient for the plaintiff to reply that the defendant must be presumed to have known that no notice of dishonor was given him. For this notice need not be personal. It may be left at the domicile or at the place of business of the endorser where the parties to the paper all reside in the same city, as they did in this case, and be sufficient, though it never came to the knowledge of the endorser, as it easily might not. The plaintiff has been grossly negligent. When the four months expired, and the note matured, when it was his duty, if he wished to preserve his security, to make demand of the makers and on dishonor to give notice in due season to the defendant, he disregarded his obligations wholly. The makers then were solvent. He might have got his money of them. Or after dishonor of the note, and after the defendant had been duly fixed, and had paid the note, the defendant could then have sued the makers and obtained payment. But the plaintiff suffered the note to sleep until after the bankruptcy of the makers. Then only when it was too late for the defendant to seek indemnity did he make demand of him and obtain from him a bare and naked promise to pay. But the plaintiff grounds his case on the promise as constituting a waiver of demand and notice alike. We have already pointed out the reasons why the promise is not a waiver of the notice of dishonor. We now go further, and contend that it does not, within the settled rules of law, amount to a waiver of demand on the makers. It lacks the vital element of *full knowledge* of that omission. A waiver must rest in all cases on the ground of knowledge as its sole foundation.

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One can waive nothing of which he is ignorant in fact. By no proof or presumption was knowledge laid at the door of the defendant, of the fact that no demand had been made of the makers of this note at its maturity, and that they had dishonored it. His belief, his wish, and his opinion, were all alike immaterial. The sole point on which the whole pivots is the knowledge in fact of the defendant when he promised to pay. All the rest is evidential and inferential. The court finds no knowledge and imputes none. The foundation of the waiver therefore utterly fails. And so are all the authorities, ancient and modern. Story on Bills, § 320; 1 Parsons Notes & Bills, 601; 2 Starkie Ev., 273; 2 Greenl. Ev., § 190; *Hoxie v. Home Ins. Co.*, 32 Conn., 21; *Creamer v. Perry*, 17 Pick., 332; *Low v. Howard*, 10 Cush., 159; *S. C.*, 11 id., 268; *Kelley v. Brown*, 5 Gray, 108; *Farrington v. Brown*, 7 N. Hamp., 271; *Edwards v. Tandy*, 36 id., 540; *Crain v. Colwell*, 8 Johns., 384; *Trimble v. Thorne*, 16 id., 152; *Sice v. Cunningham*, 1 Cow., 397; *Jones v. Savage*, 6 Wend., 658; *Backus v. Shipherd*, 11 id., 629; *Hunt v. Wadleigh*, 26 Maine, 271; *Thornton v. Wynn*, 12 Wheat., 183. The proof of security was clearly inadmissible within the case of *Holland v. Turner*, 10 Conn., 308. Whatever innovation may have been made upon the rule recognized and confirmed in that case, it has never been departed from in Connecticut. Being a Connecticut decision, directly in point, it would seem to give law to this case. 1 Parsons Notes & Bills, 571, 572, 574; *Prentiss v. Danielson*, 5 Conn., 175; *Seacord v. Miller*, 3 Kern., 55.

CARPENTER, J. This is a suit by the indorsee against the indorser of a promissory note. The note was payable on demand to the order of the defendant with interest payable semi-annually. The defendant at the time of or before indorsing the note took security of the makers, which he now holds. Payment of the note was not demanded of the makers at the expiration of four months, and no notice of non-payment was ever given to the defendant. The makers subsequently became insolvent. When demand was made of

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the defendant, he, not knowing that payment had not been demanded of the makers, promised to pay the note. He also presented a claim against the bankrupt estate of the makers for the amount of the note.

The defence is, that the holder lost his claim against the indorser by neglecting to make demand of the makers at the expiration of four months, the time when demand notes fall due by the terms of the statute. The plaintiff claims that under the circumstances of the case no such demand was necessary.

Demand of the maker at maturity, and notice of non-payment to the indorser, are essential to the liability of the latter in cases of notes payable on demand, as well as in cases of notes payable on time. By our statute the time for making such demand is at the end of four months. After the expiration of four months, therefore, the liability of the defendant ceased, unless there was a waiver of demand and notice.

The note in terms was made payable "with interest semi-annually." That is an unmistakable indication that all parties contemplated and intended a loan for at least the period of six months, and that the note should continue for that length of time as security therefor. The defendant therefore could not have expected or intended that the note should be paid at the end of four months; and if not to be paid, then a demand of payment must have been an idle ceremony, which the law does not require. Indeed, if a demand had been made and payment enforced it would have defeated the manifest intention of the parties. By endorsing the note and delivering it to the plaintiff the defendant virtually agreed that demand need not be made at the time fixed by statute. Such an agreement is presumptively a waiver; and in the absence of any evidence to the contrary may reasonably be regarded as such. Not only is there no evidence to the contrary, but the facts appearing in the case strongly fortify this presumption.

The circumstance that the indorser took security is evidence to prove an intention to waive demand and notice. It is true this court held in *Holland v. Turner*, 10 Conn., 308,

that the taking of security by the indorser did not dispense with demand and notice. It is a little remarkable however that neither the court nor the counsel who argued that case refer to the case of *Prentiss v. Danielson*, 5 Conn., 175, in which the court, by HOSMER, C. J., expressly says that "if an indorser receives security to meet a particular indorsement, he waives a demand and notice in respect of that indorsement." In that case the maker had assigned all his property to the indorser, which distinguishes it from the case of *Holland v. Turner*. We think therefore that the law is as enunciated in the later case. But while security is not in itself a waiver, it may nevertheless be evidence of a waiver, and may be considered as a circumstance to be weighed in connection with other circumstances, from all of which an intention to waive may be inferred. In *Holland v. Turner* the security was taken after the indorsement, and the court held that the subsequent security did not change the character of the undertaking and convert a conditional contract into an absolute one. The court significantly asks, "Is there any reason why his subsequently having taken a security should deprive him of a right to which he was entitled when the indorsement was made?" In this case the security was previously taken and was an existing fact when the indorsement was made. Now such security will not ordinarily change or qualify the legal contract of indorsement; but the fact that he has security shows that he had no occasion to insist upon demand and notice in order that he might secure himself upon the maturity of the note. It therefore supports the presumption of a waiver arising from the terms of the note.

One forcible reason suggested in *Holland v. Turner* is, that from the fact that no notice was given, the indorser would have a right to presume that the note was paid by the maker, and might thus be induced to part with his security. But that reason is without force in the present case, for it appears that he still retains the security. Moreover, assuming that he intended what the note fairly imports, that it should run six months or more, he could not have presumed from the absence of notice at the end of four months that his liability was discharged.

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In view of the fact that he had such security when he indorsed the note and now retains it, we are unable to see that the demand contended for would have been of any real advantage to him. If so, there was no inducement for him to insist upon it, and a waiver will be more readily presumed.

In June, 1872, more than a year after the note was given, the defendant promised the plaintiff that he would pay it. Had the defendant then known that no demand was made such promise would have been a waiver of the plaintiff's laches and the promise would have been binding. The defendant did know that no notice was given, and that the note was not paid; but it is expressly found that he did not know that no demand was made. Upon these facts the law is so, if nothing else appears, that the promise to pay was not a waiver. But it is further found that "he had no reason to believe that any demand had been made of the makers, and he did not care to know whether any demand had or had not been made, for the reason that in his view it was immaterial as to his liability to pay the note whether any demand had been made of the makers by the plaintiff."

Thus it would seem that a demand was a matter of entire indifference to him. The subject seems to have been in his mind, but he regarded it of so little importance that he did not care to inquire whether there had been a demand, and promised payment without reference to the subject at all.

This indifference is nearly equivalent to knowledge. It is perhaps a fair inference from these facts that the promise would have been made as it was, even if he had known that no demand was made. If there was negligence he seemed willing to waive it and pay the demand. Now if there is any difficulty in regarding that as a present waiver, we think we may with propriety regard it as strong evidence of a previous waiver.

He did not care to know whether a demand had been made—in his view it was immaterial. Why? Because he was fully secured, because a demand would have been contrary to the intention of the parties, and because he had agreed that no demand need be made.

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Thus it will be seen that every act of this defendant from the first down to the time when he interposed this defense, indicates an intention to waive a demand. The theory of a waiver is entirely consistent with justice and the equities of the case, and gives effect to the manifest intention of the parties, and we cannot see that it violates any legal principle.

We advise judgment for the plaintiff.

In this opinion the other judges concurred.

State v. Shields.

SUPREME COURT OF ERRORS.

NEW HAVEN COUNTY.

DECEMBER TERM, 1877.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, JS.

45	260
72	44

STATE vs. JOHN H. SHIELDS.

Where the defendant conspired with several others to commit a rape, and they together seized the woman and carried her into an alley, and the defendant, after sexual intercourse with her, fled, it was held that the acts and declarations of the others after he left were admissible against him.

The court charged the jury in the case that there was no rule of law that there could be no rape unless the woman manifested the utmost reluctance and made the utmost resistance; but that the jury must be satisfied that there was no consent during any part of the act, and that the degree of resistance was an essential matter for them to consider in determining whether there was an honest and real want of consent. Held, upon motion of the defendant for a new trial, to be no error.

The court also charged that if the woman was intoxicated at the time, or so far under the influence of liquor that her faculties for observation and understanding were impaired, then her evidence alone and unsupported would not be sufficient for a conviction, but that if her testimony was so far corroborated by other circumstances in the case as to carry conviction to their minds beyond a reasonable doubt, and to the extent that the evidence of one full credible witness would do, it would be sufficient. Held to be no error.

And held that evidence that the woman had during the year preceding been several times intoxicated, was not admissible.

The court also charged that a common prostitute was a competent and might be a reliable witness; and that it was for the jury to judge, taking the habits of the woman and all the circumstances into consideration, whether she was a credible witness. Held to be no error.

The court also charged the jury, with regard to the effect of evidence of good character, that if the jury were satisfied beyond reasonable doubt of the guilt of the accused the question of character was of little consequence, but if upon all the evidence offered there existed a reasonable doubt it became one of great importance, because it tended not only to rebut the presumption of guilt growing out of the facts proved, but to strongly fortify the presumption of

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innocence which belongs to every person until proved guilty. Held that, while evidence of good character was to be considered by the jury in coming to any conclusion upon the case, yet the charge was not open to exception as conveying a different idea. It was to be understood as explaining merely the degree of weight to be given to the evidence of good character in its relation to the other evidence in the case.

While to constitute rape an actual penetration of the body of the woman is necessary, yet the least penetration is sufficient.

INDICTMENT for rape; brought to the Superior Court in New Haven County, and tried to the jury, on the plea of not guilty, before *Sanford, J.*

Upon the trial Ellen Warner, the complainant, testified that about eleven o'clock in the evening on which the offence was committed she went to the York House on Bridge street, in New Haven, kept by John Crawford, for the purpose of seeing his wife and her mother, that she staid there about an hour in a room adjoining the bar room, that the defendant and several others were there, who left just before she did, that she then started to go home, and immediately upon going into the street was seized by the defendant and several others, carried into an alley near by, and ravished by the defendant and by several of the others; that the defendant was the first to have connection with her, and that when he had done he ran away and she saw him no more. She was then asked what occurred after the defendant left. To this question the defendant objected, but the court admitted it upon the claim by the state that the evidence was to a part of one transaction, the ravishment having been planned by several of whom the defendant was one, and because circumstances occurred after the defendant left which tended to identify him as one of the guilty parties; and thereupon she testified to the circumstances attending the ravishment by the other parties, and all that occurred, so far as she could recollect, until she was found in a nearly senseless condition and taken to the police station.

The complainant testified that she was a married woman, having been married in October, 1874, since which time she had lived and was still living with her husband.

It was proved by the defendant, and not denied by the state,
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that prior to the time of her marriage in 1874, the complainant had visited and lived at various houses of ill-fame, but there was no evidence showing that she had done so since her marriage.

The defendant introduced a witness to show that the complainant was on one occasion during the past year at the house of the witness intoxicated, and claimed to show by other witnesses other instances, during the past year and previously, of her intoxication, all of which was on objection by the State's Attorney excluded by the court, the defendant excepting.

The state offered as a witness Dr. Whittemore, who testified that he examined the witness the morning after the assault upon her and found her genital organs bruised, bloody, swollen, sensitive to the touch, and that she complained of a scalding sensation in the passage of urine. He was then asked—"From your examination did you form an opinion as to how the injuries to her genital organs were produced?" - To this question the defendant objected, but the court admitted it, and the witness replied that he was of opinion "that they were produced by a forcible attempt at intercourse;" to which question and answer the defendant excepted. The same witness was also asked, against the objection of the defendant, "Did you from your examination form an opinion as to whether there had been penetration?" And answered: "My opinion was that penetration had taken place as far as the internal organs of generation, whether further or not I cannot from my examination say;" to which question and answer the defendant excepted.

The state called as a witness one Flaherty, who testified that after the affair was over he went up to the next corner, about two hundred and fifty feet from the place where the offence was committed, and found the defendant and one Frawley sitting on some steps in front of a store; that he spoke to them and said, "Those fellows ought to be arrested;" to which the defendant replied: "No, G-d d—n her, it serves her right; it will learn her better than to be caught in such a crowd again." To this evidence the defendant objected, but the court admitted it.

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The defendant requested the court to charge the jury "that to constitute rape actual penetration of the body of the woman by the insertion into her of the private parts of the accused is absolutely necessary." The court charged as requested, but added, "but the least penetration is sufficient;" to which the defendant excepted.

The defendant also requested the court to charge the jury "that there is no rape unless the woman manifested the utmost reluctance and made the utmost resistance." The court in reference to this request charged as follows: "If by this is meant that you must be satisfied that the woman, according to your measure of her strength, used all the physical force in opposition of which she was capable, it is not the law, for there is no such rule of law. You must be satisfied that there was no consent during any part of the act, and the degree of resistance is an essential matter for you to consider in determining whether the alleged want of consent was honest and real;" to all which the defendant excepted.

The defendant also requested the court to charge the jury "that if this woman, the only person who says the accused was the guilty party, was intoxicated at the time, or was so far under the influence of liquor that her faculties for observation and understanding were impaired, then her evidence is not that of a full and competent witness, and a verdict of guilty should not be rendered on her testimony." The court charged the jury as requested, but inserted before the words "is not" and after the word "evidence" the words "alone and unsupported," added at the end of the request the word "alone," and then proceeded as follows:—"But if on the other hand, notwithstanding these conditions, her testimony is so far corroborated by other circumstances in the case as to carry conviction to your minds beyond reasonable doubt, and to the extent that the evidence of one full, credible witness would do, and is so equivalent to it, that is sufficient." To all which the defendant excepted.

The defendant requested the court to charge the jury "that if they should find that the woman was a common prostitute,

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and of low, depraved and lewd habits, her evidence is not that of a full, competent and wholly reliable witness in a case like this." The court charged the jury in reference to this request as follows: "I cannot say this as a matter of law. A prostitute is a competent witness. She may be a credible witness, she may not be a credible witness. A witness may be of low, depraved and lewd habits and still be competent and credible. She may be competent and yet incredible. It is for the jury to judge, taking her habits and all the circumstances into consideration, whether such a witness is a credible or incredible witness." To all which the defendant excepted.

The court also charged the jury as follows: "Evidence has been offered to establish for the accused a good character. If the jury are satisfied, beyond all reasonable doubt, of the guilt of the party accused, the question of character is of little consequence; but if upon all the evidence there exists such reasonable doubt, the question of character becomes of great importance; because, if such good character be established, it tends not only to rebut the presumption of guilt growing out of the circumstances proved against him, but also strongly to fortify that presumption of innocence which rightfully belongs to every one accused of crime until proved guilty." To this charge the defendant excepted.

The jury having returned a verdict of guilty, the defendant moved for a new trial for error in the rulings and charge of the court.

W. C. Robinson, in support of the motion.

1. The court erred in admitting evidence as to the injuries perpetrated on the complainant by third persons after the defendant had gone away. This was certainly *res inter alios*. Anything done by the others which indicated Shields as the first ravisher might be shown; but a second forcible act of intercourse could not indicate the committer of the first. Rape is not a joint crime. The ravisher cannot be held responsible, in any degree, for subsequent rapes taking place in his absence. If any such relation as co-conspirator, or

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principal in the second degree, or accessory, can exist in this case, it cannot be proved, in this way, in an indictment for one act of rape. There should be other counts covering that ground.

2. The court erred in excluding the evidence offered to show that the complainant was often intoxicated. *Christian v. The Commonwealth*, 23 Gratt., 954; *Brennan v. The People*, 14 N. York Supreme Ct., 171; *Woods v. The People*, 55 N. York, 515.

3. The court erred in charging that in rape the least penetration is sufficient. *Rex v. Gammon*, 5 Car. & P., 321.

4. The court erred in charging that resistance on the part of the complainant was not necessary, and that the presence or absence of resistance was material only upon the question of consent. This ignores one essential feature of the crime of rape. There must both be force, actual or constructive, on the part of the ravisher, and want of consent on the part of the woman. Otherwise a mere refusal on her part without resistance would be sufficient. 2 Swift Dig. (Rev. ed.,) 322; *Charles v. The State*, 6 Eng., 389; *Pleasant v. The State*, 8 id., 360; *Regina v. Sweeney*, 8 Cox C. C., 223; *Regina v. Mayers*, 1 Green C. R., 318, note; *People v. Brown*, 47 Cal., 447; *State v. Burgdorf*, 53 Misso., 65; *Christian v. The Commonwealth*, 23 Gratt., 954; *Strang v. The People*, 24 Mich., 1; *Cato v. The State*, 9 Fla., 168; *People v. Dohring*, 59 N. York, 381.

5. The court erred in refusing to charge the jury that if the complainant were so intoxicated that her faculties were impaired when the rape was committed, a verdict of guilty should not be rendered against the accused on her evidence alone. The accused had a right to this charge. The complainant was the only witness who testified to the identity of the accused. If she was so drunk at the time that her faculties of observation were impaired, she was not a full and competent witness, and her evidence was not sufficient to justify a conviction. The charge of the court was that a witness, otherwise unreliable, may be so corroborated as to make her evidence credible. This was not responsive to the request. It turned the mind of the jury away from the true question.

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6. The court erred in refusing to charge the jury that in a case of rape the evidence of the complainant, if she be a common prostitute, and of low, depraved and lewd habits, is not that of a full, competent, and wholly reliable witness. The accused had a right to this charge. The most pious and virtuous woman could not be more than a full, competent, and wholly reliable witness. If a prostitute is equally so, for what purpose is evidence of her unchastity admissible? Is an impeached or infamous witness full, competent and wholly reliable? But here again the court turned the attention of the jury from this question by charging that her testimony, properly corroborated, might be credible.

7. The court erred in charging the jury that good character, instead of being a fact to be considered by them in determining whether there was reasonable doubt, was a fact of importance only where the existence of reasonable doubt was already determined. This is erroneous. If it were correct, character would never be important. For where there is no reasonable doubt of guilt the jury must convict. Where there is such doubt they must acquit. The true rule is that the jury must consider character as an element entering into their decision of the question whether reasonable doubt exists. *Regina v. Rowton*, 10 Cox C. C., 25; *Felix v. The State*, 18 Ala., 725; *Fields v. The State*, 47 id., 603, 605; *State v. McMurphy*, 52 Misso., 251, 253; *Harrington v. The State*, 19 Ohio S. R., 269; *Stewart v. The State*, 22 id., 478; *State v. Ashe*, 44 Cal., 288. The rule as stated by the court is not only erroneous but inconsistent with itself, the latter portion contradicting the former and confusing the jury, when it should have been clearly and simply as above laid down.

O. H. Platt, State's Attorney, contra.

PARK, C. J. We find no error in this case which entitles the defendant to a new trial.

It appears in the motion that all the rulings of the court in the admission and rejection of evidence, and in the charge to the jury, are made the subjects of complaint. It would be a

waste of time to remark upon them all, as most of them are manifestly correct.

The defendant was on trial for a crime, which the state claimed to have proved was committed in fulfillment of a common purpose and design entered into between the defendant and several other persons who were present aiding and abetting him in the commission of it. The defendant ran away before the entire undertaking was accomplished. The state offered to prove what was done after the defendant had left, not for the purpose of showing that other crimes were committed by the other conspirators, but to prove that the defendant committed the particular crime laid to his charge. The court received the evidence, and we think committed no error by so doing. Suppose three or more persons should enter into a conspiracy to burn a building. It is arranged among them that *A* shall fire the building, and the other conspirators stand guard in the meantime to prevent discovery. They go to fulfill their design, and each performs the task assigned him; but *A*, immediately after the fire is set, runs away, contrary to the expectation of the others. The others remain and perform various acts intended to cover up the crime. Now it is well settled that evidence of the entire transaction covered by the conspiracy, from its commencement to its termination by the departure of all the conspirators from the scene of the crime, is admissible against *A* as well as against each of the other parties on their separate trials for the commission of the crime. The ruling of the court goes no farther than this, and is clearly correct.

All the remaining rulings of the court upon questions of evidence raised in the case are manifestly correct, and we pass them without comment.

The same is true of the instructions of the court to the jury, with perhaps two exceptions which we will notice.

The defendant requested the court to charge the jury, that to constitute the crime of rape it was necessary that the prosecutrix should have manifested the utmost reluctance, and should have made the utmost resistance. The court did not comply with this request, and the refusal to do so is made a ground for asking a new trial.

While it may be expected in such cases from the nature of the crime that the utmost reluctance would be manifested, and the utmost resistance made which the circumstances of a particular case would allow, still, to hold as matter of law that such manifestation and resistance are essential to the existence of the crime, so that the crime could not be committed if they were wanting, would be going farther than any well-considered case in criminal law has hitherto gone. Such manifestation and resistance may have been prevented by terror caused by threats of instant death, or by the exhibition of brutal force which made resistance utterly useless; and other causes may have prevented such extreme opposition and resistance as the request makes essential. The importance of resistance is simply to show two elements in the crime—carnal knowledge by force by one of the parties, and non-consent thereto by the other. These are essential elements, and the jury must be fully satisfied of their existence in every case by the resistance of the complainant, if she had the use of her faculties and physical powers at the time, and was not prevented by terror or the exhibition of brutal force. So far resistance by the complainant is important and necessary; but to make the crime hinge on the uttermost exertion the woman was physically capable of making, would be a reproach to the law as well as to common sense. Such a test it would be exceedingly difficult, if not impossible, to apply in a given case. A complainant may have exerted herself to the uttermost limit of her strength, and may have continued to do so till the crime was consummated, still a jury, sitting coolly in deliberation upon the transaction, could not possibly determine whether or not the limit of her strength had been reached. They could never ascertain to any great degree of certainty what effect the excitement and terror may have had upon her physical system. Such excitement takes away the strength of one, and multiplies the strength of another. The request in substance is as follows: that inasmuch as non-consent is to be proved by the resistance made, therefore, if the resistance falls short of the extremest limit that could have been made, the deficiency necessarily shows consent, and should be so charged as matter of law. The fallacy lies in

the assumption that the deficiency in such cases necessarily shows consent. If the failure to make extreme resistance was intentional, in order that the assailant might accomplish his purpose, it would show consent; but without such intent it shows nothing important whatsoever. The whole question is one of fact, and the court committed no error in so leaving it to the jury.

The remaining question which we shall notice arises on the following charge to the jury. "Evidence has been offered to establish for the accused a good character. If the jury are satisfied beyond all reasonable doubt of the guilt of the party accused, the question of character is of little consequence, but if upon all the evidence there exists such reasonable doubt, the question of character becomes of great importance, because if such good character be established, it tends not only to rebut the presumption of guilt, growing out of the circumstances proved against him, but also strongly to fortify that presumption of innocence which rightfully belongs to every one accused of crime until proved guilty."

By this charge the court merely informed the jury regarding the weight of the evidence of good character, in different views of the case. The evidence had been introduced for the jury to consider in connection with the other evidence; and they were told that evidence of good character was of little importance when opposed by evidence of so conclusive a nature as to leave no reasonable doubt of the guilt of the accused. They were to find the defendant guilty beyond all reasonable doubt, if they found him guilty; but, in coming to a conclusion, if the evidence of guilt was conclusive of the fact, then but little weight should be given to evidence of character, although it should be considered with the other evidence. It is true, as the defendant claims, that evidence of good character should be considered by the jury in coming to a conclusion, but the weight of the evidence would depend upon the weight of the other evidence in the case.

We do not advise a new trial.

In this opinion the other judges concurred.

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JOHN SHIELDS *vs.* THE STATE.

Upon a petition for a new trial for newly discovered evidence, after a conviction for a rape, it was held—

1. That the fact of the existence of the newly discovered evidence could not be proved by mere *ex parte* affidavits.
2. That new evidence was not sufficient that merely went to show that the principal witness had before the trial made a statement inconsistent with that made on the trial.
3. Nor that which showed that the witness, (the victim of the rape,) had altered her opinion as to the petitioner being the person who committed the crime, where the change of opinion originated in a suggestion by another and was arrived at by a process of reasoning.

It is a general rule that a new trial will not be granted upon the mere after-recollection of a former witness.

PETITION for a new trial after a conviction upon an indictment for rape; (see the case next preceding;) brought to the Superior Court in New Haven County, and reserved, upon a finding of the facts, for the advice of this court. The case is fully stated in the opinion.

W. C. Robinson, for the petitioner.

O. H. Platt, State's Attorney, for the State.

LOOMIS, J. The petitioner, having been convicted of the crime of rape upon the person of one Ellen Warner, brought his petition to the Superior Court for a new trial for newly discovered evidence; and the case was reserved for the advice of this court.

The newly discovered evidence is all contained in two affidavits annexed to the petition, which were taken before the petition was served, without any notice or opportunity for cross-examination in behalf of the state.

Assuming for the present for purposes of discussion that the *ex parte* affidavits are competent evidence, do they disclose sufficient ground for granting a new trial?

The evidence relied upon consists of two items;—1st. That Mrs. Warner, the victim of the crime, before her testimony was given in court, made an admission to a Mrs. Collins,

45	286
89	191
45	286
175	583

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which is claimed to be inconsistent with her testimony as given at the trial. 2d. That after the conviction of the petitioner, upon the suggestion of a fact by Mrs. Collins, Mrs. Warner believes she made a mistake in charging Shields with the crime.

1. The admission to Mrs. Collins, according to her affidavit, was as follows:—

“I know Mrs. Ellen Warner of New Haven; have known her the past four or five years; took care of her the day after this outrage. I asked her if she knew these parties, or any of them, and she said, ‘No; but they were a rough crowd of fifth-warders.’”

It seems to us that such testimony is too uncertain to affect the case. It appears that several persons were concerned in the assault on Mrs. Warner, all of whom were entire strangers except Shields. The case, as stated in the petition and in the affidavit of Mrs. Warner, proceeds on the idea that she knew him, and had just seen him with this rough crowd in the saloon, at the door of which she was seized by several persons when she was going out. Now, when asked in that general way “if she knew these parties or any of them,” no particulars being given, may she not have referred to these strangers?

But however this may be, the most that could be claimed for it is, that it was a statement out of court somewhat inconsistent with her testimony at the trial, and as such would be one mode of impeaching the credit of the witness. 1 Greenl. Ev., § 462. And as it is well settled, as laid down in *Parsons v. Platt*, 37 Conn., 564, and other cases, that the new evidence must not be offered to impeach a witness, why should not the rule exclude such evidence as this? If a direct impeachment, that tends utterly to destroy the credibility of the witness, is excluded, it would be strange to admit an indirect impeachment, which, as in this case, could only affect the witness in some slight degree.

In *Commonwealth v. Drew*, 4 Mass., 399, the defendant, after he had been convicted of the crime of murder, ascertained that a material witness for the government had declared

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before the trial that he would hang the prisoner by his testimony if he could, and for this newly discovered fact applied to the court for stay of sentence and relief; but the court held that it was insufficient to avail the prisoner on any legal principles.

2. In regard to the other item of new evidence, that Mrs. Warner made a mistake in her identification of Shields, we think the fact of a mistake is not sufficiently shown.

Where a mistake is made to appear plainly by extrinsic facts and circumstances, as for instance where persons are convicted of theft and the alleged stolen property is afterwards found by the owner not to have left his own possession; or where, after conviction for murder, the alleged victim is found alive, justice as well as public policy would demand the correction of the mistake and the speedy relief of the parties affected by it.

But in the case at bar the mistake is not otherwise evidenced than by the altered opinion of the witness.

The affidavit of Mrs. Warner is as follows:—"I was the complainant in the above entitled case and testified that Shields was one of those who made the attack upon me. I then believed that I was telling the truth. In a conversation this day with Mrs. Hanna Collins I was reminded of a circumstance which showed me that I was wrong in saying that Shields was one of them. I was excited at the time; it was dark, and I had seen Shields in the saloon before the attack; and when I testified I felt certain that he was one of those who attacked me, but now I feel sure he was not. I make this statement because I now believe Shields to be innocent, and wish to undo the wrong which, my mistake has brought upon him.

"July 31st, 1877.

her
Ellen + Warner."
mark

The following is the affidavit of Mrs. Collins, so far as it relates to this point:—"I had been told by somebody that when the crowd were going out of the door after Mrs. Warner, some one of them told Shields to get out of the way, for Mrs. Warner knew him, and that he went away. On this, the 31st day of July, 1877, I saw Mrs. Warner and asked her

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if she did not remember that as she was going out of the door some one told Shields to get out of the way, as she knew him? Mrs. Warner said that she had not thought of it before I spoke of it, but now she remembered it, and she must have made a big mistake in her testimony at the time of the trial in saying that Shields was the one who took hold of her by the throat, that she was very sorry for having made such a mistake and would be willing to do anything to correct the mistake. I told her then that she ought to go to Judge Robinson and see if he could do anything about it, and she came here with me. Dated at New Haven, Conn., July 31st, 1877.

her
Hanna + Collins."
mark

It will be seen from the above that Mrs. Warner's change of opinion, after the conviction of Shields, originated in the suggestion of a fact by her friend, and a process of reasoning thereon. And it is to be noticed also that the fact referred to had only a very remote connection, if any, with the question of identification. If Shields was told by somebody to get out of the way, it implied that he was in the way, but it cannot be implied that he obeyed the request; and without this last mentioned fact, (which is not found,) the process of reasoning has no basis to rest upon.

Identification from the nature of the case is not susceptible of demonstration; it rests mainly on impressions derived through the senses, and does not ordinarily depend on any conscious process of reasoning. As we remarked in giving the opinion in *Sytleman v. Beckwith*, 43 Conn., 13: "A witness well acquainted with another usually identifies him without conscious mental effort in the way of comparison or inference. In the absence of striking peculiarities of form or feature the identification may be, and often is, by the mere expression of countenance, which cannot be described. And the witness may be correct in his opinion, and yet be unable to give a single feature, or the color of the hair, or of the eyes, or any particulars as to the dress. In such cases the distinction between opinion and fact is so very nice that it might perhaps have been as well to consider such identification as a fact, like any other direct perception of the senses."

To allow a case depending on opinion or identification to be re-opened on such grounds as are here disclosed, would open a wide, convenient, and tempting door to defeat the ends of justice. After the trial is over and the accused stands convicted, with the heavy penalty of the law impending and just ready to fall upon him, how easy by artful or even honest suggestion to awaken a sympathy even in the heart of the victim, who was the main, perhaps only witness against the accused, and who naturally feels responsible for the conviction; and how easy for such witness by a process of speculation, colored by feeling, to feel and express a doubt about the correctness of the opinion entertained at the time of the transaction.

While we would gladly grant relief for a manifest mistake, yet in such a case as this the maxim, "*Interest reipublice ut sit finis litium*," applies in full force.

We know of no adjudicated case precisely like this, but there is a well settled general rule, sustained by numerous authorities, which applies; this is, that a new trial will not be granted on the mere after-recollection of a former witness. *Duignan v. Wyatt and another*, 3 Blackford, 385; *Johnson v. Blanchard*, 5 R. Island, 24; *Bond v. Cutler*, 7 Mass., 205; *King v. Gray*, 17 Texas, 62; *Archer v. Herdt*, 55 Geo., 200; *Ainsworth v. Sessions*, 1 Root, 175.

There are exceptions to the above rule, as in the case last cited, but there is nothing in the case at bar to make it an exception.

3. The only remaining question is, whether the existence and character of the new evidence can be shown by *ex parte* affidavits. The disposal of the present case does not require an answer to this question; but if we now avoid the question doubts will be raised about the proper rule of practice, which will embarrass the profession in bringing future petitions.

Until this case we had supposed there was no doubt that by our practice the allegations relative to the new evidence should be sustained by testimony, either *ore tenus* or by deposition, as in other cases at law. In other states and in England where the chancery practice is different, affidavits have been

received. The argument in behalf of the petitioner is founded upon the practice of other states; and also upon the claim that when the General Assembly of this state in 1762 committed to certain courts the power "to grant new trials according to the common and usual rules and methods," (which expression is still retained in our statutes,) the rules of the common law as evidenced by the decisions in England must have been referred to and adopted.

We cannot accept this statement as correct. The rules and methods of our own state were intended. Judge Swift says in his introduction to the second volume of his Digest, p. 17, that "as our courts of law succeeded to the General Assembly as courts of equity they adopted their mode of proceeding instead of the English, especially in regard to taking testimony by *vivâ voce* examination of witnesses." See also 1 Swift's Digest (Rev. ed.,) top p. 271. Affidavits that fill so many volumes in the chancery records of England and of some of our sister states are almost unknown in our practice.

This court at an early day, in *Jerome v. Jerome*, 5 Conn., 352, decided that "an affidavit, by our practice, is not required to be annexed to a bill in chancery in any case." In the earliest reported cases in this state, as well as in the later decisions, there is no reference to affidavits, but in many cases the expressions used indicate that the witnesses were personally present. For example, in the case of *Noyce v. Huntington*, Kirby, 282, decided in 1787, it is said "that a witness named in the petition was *offered by the petitioner* but the court refused to allow him to *be sworn*, because due diligence had not been used to procure his testimony at the former trial. The petitioner then *offered a witness* to be *sworn*, who was not named, and the court for this reason refused to allow him to be sworn. Some members of the court however thought he might be admitted after *witnesses had testified who were named*. No after witnesses were offered and the petition was withdrawn." If the practice had been to prove the case by affidavits alone such expressions as are contained in the above would not have been used.

But it is said that the application for a new trial is always

to be determined, not by the merits of the *cause* in which the application is made, but by the merits of the *application* itself, and therefore affidavits are the only proper testimony. We do not see how the conclusion follows from the premises. To determine the merits of the application the court must put itself, so to speak, in the place of the court before whom the original cause was heard, and carefully weigh all the new evidence with that previously offered, in order to decide whether a re-trial would probably change the result. The new evidence, it will be conceded, must be under the sanction of an oath, and must be thoroughly sifted and weighed by the court; why then should it not for the same reason have applied to it the test of cross-examination, justly described as "one of the principal and one of the most efficacious tests which the law has devised for the discovery of the truth." 1 Greenl. Ev., § 446. To allow the rights of parties to be affected by *ex-parte* affidavits without the protection of a cross-examination, is almost as unjust as to allow the statement of a witness not under oath. Such a practice would not only affect injuriously the rights of parties, but would open a wide door for imposition upon both witnesses and court.

The case at bar well illustrates the danger of such evidence. The entire evidence consists of two affidavits signed only by a mark. In all probability the affiants could neither read nor write. The contents of the affidavits might not have been made known, or may have been imperfectly understood; and how, and under what circumstances and inducements, they were obtained, could only be known through the sifting process of a cross-examination. In this case it is found that the witness might have been produced in court without trouble or difficulty.

We think therefore a new trial should be refused on both the grounds before mentioned, and we advise that the petition be dismissed.

In this opinion the other judges concurred.

THE STATE *vs.* JOHN BYRNE.

Upon an information for burning a building with intent to defraud an insurance company—it was held—

1. That it was not necessary to prove the legal existence of the company. That if the company had a *de facto* organization, and was actually doing business, and the accused believed the policy to have been legally issued, and burned the building with the expectation that the money would be paid and for the purpose of obtaining it, it was sufficient.
2. That if it was necessary to prove the legal existence of the company, which was a foreign one, a certificate of the insurance commissioner of this state that the company had complied with the laws of the state and was authorized to carry on business here, (the statute requiring the commissioner to issue such certificate only on proof of the facts and on a deposit with him of a copy of the charter and a sworn statement of its officers,) and the testimony of the agent of the company here that he had issued numerous policies for the company, were *prima facie* evidence of such legal existence; the case not being one in which the company was asserting its rights or in which its legal existence was directly in issue.
3. That the fact that the policy was made payable to a mortgagee of the building was not inconsistent with the allegation that the company insured the building to the accused.
4. That the intent to defraud the insurance company could be inferred from the circumstances.

INFORMATION for burning a dwelling house with intent to defraud an insurance company; brought to the Superior Court for the county of New Haven, and tried to the court, (upon the defendant's election so to be tried under the statute,) upon the plea of not guilty, before *Park, C. J.*

The information charged as follows: "That on the 14th day of June, 1877, at the town of New Haven, John Byrne of said New Haven, with force and arms, wilfully and feloniously did burn a certain building, to wit, a dwelling house then situated in said town of New Haven, known as No. 126 Fillmore street, of which building said John Byrne was at the time of the burning of the same as aforesaid the owner, with intent thereby to defraud the Republic Fire Insurance Company, a corporation duly organized and existing under the laws of the state of New York, for the purpose of carrying on a general insurance business throughout the United States, and especially in the state of Connecticut, having its

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principal office in the city of New York, and which said corporation had previously insured said building of said John Byrne to him the said John Byrne against loss by fire, to the amount of fourteen hundred dollars, by its written policy of insurance theretofore issued and delivered by it to said John Byrne, a more particular description whereof is to the attorney unknown, which said policy of insurance was at the time of the burning of said house in force as a valid policy of insurance. And so the said attorney says that on said 14th day of June, 1877, at New Haven aforesaid, said John Byrne, being then and there the owner of said building as aforesaid, the same wilfully and feloniously did burn, with intent to defraud said insurance company out of said fourteen hundred dollars insurance as aforesaid, against the peace, of evil example, and contrary to the statute in such case made and provided."

Upon the trial it appeared that on the 14th day of June, 1877, the defendant was the owner of the house in question; that the house, together with the lot on which it stood, was mortgaged by the defendant to the National Savings Bank of New Haven to secure a loan of \$1,200; and that there was accrued interest to the amount of \$52 due the bank. It also appeared that about two o'clock on the morning of that day the house was discovered to be on fire, and that it was partially consumed.

For the purpose of proving that the building was insured, the state offered in evidence what purported to be a policy of insurance for \$1,400, issued by the Republic Insurance Company of New York, which was procured by the defendant and the premiums paid by him. The state further offered the testimony of one Frederick A. Chase, who testified that the firm of which he was a member caused the policy to be issued, and that he personally procured it to be done; that the insurance company had done business in this state since 1872, and that he had done a fair business for them, and had procured for them many policies during that time in this state. He also testified that at the time of the issuing of the policy the firm of which he was a member held a certificate given

them by John W. Stedman, Insurance Commissioner of this state, authorizing them as agents of the company to transact fire insurance business in this state for the current year, and produced such certificate in court, and the same was by the state introduced in evidence. The certificate stated that the insurance company had "complied with all the laws of this state so far as the same were applicable to fire and marine insurance companies incorporated by or organized under the laws of other states of the United States."

But the state did not prove and did not claim to have proved by direct evidence, that the company had an actual existence, and did not prove or claim to have proved, except by the testimony of said Chase and by the certificate, that it had so complied with the laws of this state as to enable it to issue policies or do business in this state. In regard to this part of the case the defendant claimed that the state was bound to prove the actual legal existence of the company in New York by direct evidence, and that it had complied with all the requirements of our laws relating to foreign insurance companies; but the court overruled this claim and ruled that the evidence was proper, and might be sufficient in the absence of other conflicting evidence to establish the fact beyond reasonable doubt that the company was duly incorporated, organized, existing, and legally authorized to do business in this state, and had complied with the requirements of the law of this state.

The defendant further claimed that there was a material variance between the information and the proof, in this, that the policy on the face of it was made payable to the bank, the mortgagee, to secure its loan to the defendant in case of loss, and that there was nothing in the policy to show that under any circumstances the loss was payable to the defendant so long as the mortgage interest continued. Upon these facts the defendant claimed that the proof did not sustain the allegation, but the court ruled that the proof did sustain the allegation, and that there was no material variance.

The defendant claimed that in order to prove the intent to defraud the insurance company the state must show that the

intent existed by other evidence than the mere act of burning by the defendant; but the state claimed that the proof of the burning of the house by the defendant, together with the following circumstances proved by the state, namely, that the house immediately prior to the fire was worth no more than the sum of \$1,000, that the mortgagee was pressing the defendant for payment of the interest then due, that the building was insured for the sum of \$1,400, and that the defendant was out of work, and had been for a long time, and had no money to pay the interest, and had offered the place for sale, was proper and sufficient evidence on the subject. The defendant claimed that the evidence was not sufficient, but the court held that the intent could be inferred from the above circumstances in connection with all the facts of the case bearing on the subject.

The court having found the defendant guilty, he moved for a new trial for error in the rulings of the court.

W. C. Robinson and *F. A. Robinson*, in support of the motion.

1. The allegations that the insurance company was duly organized under the laws of New York, and was authorized to do business in this state, are material allegations. *People v. Peabody*, 25 Wend., 472; *Jones v. The State*, 5 Sneed, 346. And they can only be proved by the production of the act of incorporation itself, or by the production of a sworn copy of such act. *Stone v. The State*, 1 Spencer, 401; *Jones v. The State*, 5 Sneed, 346; *Williams v. Sherman*, 7 Wend., 111; *U. S. Bank v. Stearns*, 15 id., 314. Our statutes provide that no insurance company organized under the laws of any other state shall transact business in this state until it has complied with the requirements of sec. 9, art. 1, part 7 of chap. 2, title 17 of the Revised Statutes. The state was therefore bound to prove affirmatively that this company had complied with all these requirements, for until this had been proved the court could not find that any contract of insurance existed between the defendant and the insurance company by which the latter could be bound. The statement of Mr.

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Chase, and the certificate produced by him, which he testified he had received from the insurance commissioner, did not prove this. It could only be proved by the same kind of evidence that was required to prove the incorporation and organization in New York, to wit, by the production of the certified copy of the charter deposited with the insurance commissioner, together with the sworn statement of its officers prescribed by the statute. *Stone v. The State*, 1 Spencer, 401; *Jones v. The State*, 5 Sneed, 346. If the company had no legal existence and could make no valid contract here, it could not be defrauded, and the defendant is not guilty. *De Bow v. The People*, 1 Denio, 9; 2 Russell on Crimes, 568; *State v. Wilson*, 30 Conn., 500.

2. The proof must sustain the allegations. Any difference in substance between the statements in the information and the evidence as to the offence charged, will be fatal. 2 Russell on Crimes, 794; 1 Bishop Crim. Law, 886; *Pryor v. The Commonwealth*, 2 Dana, 298. The allegation that there was an insurance on the property of the defendant at the time of the burning was a necessary and substantive one, and must be proved as laid. 1 Greenl. Ev., § 65. The allegation was that the insurance company insured said building to *him*, and delivered the policy to *him*, but the proof was that the policy was payable to the mortgagee, and there was nothing in it to show that under any circumstances it was payable to Byrne, so long as the mortgage interest continued.

3. The intent to defraud the insurance company must be proved by other evidence than the mere fact of burning. This intent must be proved in addition to the more general intent, in order to make out the offence, and nothing will answer as a substitute for it. 1 Bishop Crim. Law, 427. Where a man is charged with burning a house in his own occupation with intent to defraud an insurance company, the intent cannot be inferred from the mere act itself. 2 Arch. Crim. Law, 724. The only evidence of such intent, besides the evidence of the mere burning, was, that the house, immediately prior to the fire, was worth no more than \$1,000; that the mortgagee was pressing for the payment of the interest

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then due; that the building was insured for \$1,400; that the defendant was out of work, and had no money to pay the interest, and that he had offered the place for sale. This did not prove the intent charged; malice toward the mortgagee, or wish to commit suicide, might have prompted the act. The proof must be such as to exclude the probability of any other intent than the one charged.

O. H. Platt, State's Attorney, contra.

1. Respecting proof of the legal existence of the insurance company, which had insured the house of the accused, it was sufficient to prove that it was a corporation *de facto*, doing an actual insurance business in this state. *People v. Hughes*, 29 Cal., 257; *People v. Schwarz*, 32 id., 160; *McDonald v. The People*, 47 Ill., 533; *Commonwealth v. Goldstern*, 114 Mass., 272; *Dennis v. The People*, 1 Parker Crim. R., 469; *People v. Chadwick*, 2 id., 163; *Mackesey v. The People*, 6 id., 114; *Reed v. The State*, 15 Ohio, 217.

2. There was no variance. The policy was issued to the accused. That it was made payable in case of loss to the National Savings Bank, as its interest might appear, could not and did not change the fact that the insurance company had assured the accused, and him alone, against loss or damage on the house. The insurance was to the accused; the loss, if any, was primarily his; and the payment of the loss by the company would enure wholly to his benefit.

3. Intent in this case could be proved, like any other fact, by circumstantial evidence. *Shepherd v. The People*, 19 N. York, 537; *Commonwealth v. Hudson*, 97 Mass., 565.

CARPENTER, J. Our statute provides that "every person who shall commit arson, and every owner or tenant of any building who shall wilfully burn it, or anything therein, with intent to defraud another," &c., "shall be imprisoned in the state prison not less than seven, nor more than ten years." The prisoner was charged with a violation of this statute by burning his own dwelling house, "with intent thereby to defraud the Republic Fire Insurance Company, a corporation

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duly organized and existing under the laws of the state of New York for the purpose of carrying on a general insurance business throughout the United States, and especially in the state of Connecticut." The cause was tried before the Chief Justice without a jury. On the trial the state offered in evidence a policy of insurance on the building issued by said company, and procured by the prisoner, who paid the premium thereon. The state further proved by one Frederick A. Chase that the firm of which he was a member caused the policy to be issued, and that the company had done business and issued many policies in this state since 1872. He also testified that at the time the policy was issued the firm of which he was a member held a certificate from the insurance commissioner of this state, authorizing them as agents of said company to transact fire insurance business in this state for the current year. The certificate was also offered in evidence, which states that the insurance company had "complied with all the laws of this state so far as the same are applicable to fire and marine insurance companies incorporated by or organized under the laws of other states of the United States." Compliance with the laws of this state was not otherwise proved, and there was no direct evidence of the actual existence of the insurance company. The defendant claimed that the state was bound to prove the actual legal existence of the company in New York by direct evidence, and that it had complied with all the requirements of our laws relating to foreign insurance companies. The court overruled this claim, and held that the evidence was proper evidence on the subject, and might be sufficient, in the absence of other conflicting evidence, to establish the fact that the company was duly incorporated and legally authorized to do business in this state. The prisoner excepted and now asks for a new trial.

His counsel now claims that the existence of the corporation could only be proved by an exemplified or sworn copy of the act of incorporation; and that a compliance by the company with the laws of this state could only be proved by producing the copy of the charter deposited with the insurance commissioner, together with the sworn statement of its officers prescribed by the statute.

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If it be conceded that it was necessary for the state to prove that the company complied with the statute of this state, we think that the certificate of the commissioner was competent evidence, and sufficient *prima facie* to establish the fact.

The statute expressly requires such a certificate and that it should state expressly the fact sought to be proved. It will not be presumed that the commissioner would certify to that fact unless it existed; on the contrary the presumption is that the certificate is true. It will be remembered that the contents of the charter and the sworn statement are not in this case the subjects of proof, but simply whether such document has been deposited as required by law. Any witness who knows that fact may testify to it, and his testimony is primary proof, and of as high order as the production of the documents themselves. This certificate is evidence of the authority of the agents to issue the policy, and presupposes that every step essential to its validity has been taken.

But we do not understand that such proof is essential. The offense is complete if he burns his building "with the intent to defraud another." That intent may exist irrespective of a compliance with this statute by the company issuing this policy. If he believes that the policy was legally issued, that it was valid, and would be paid, and burned the building with the expectation and belief that the money would be paid, and for the purpose of obtaining it, it is enough. The actual payment of the money, and the legality and validity of the policy, are not essential elements of the crime.

Moreover the policy may be valid and collectible without complying with the statute. The company issuing it would violate our laws, but it is difficult to see how such violation could be a defense to an action on the policy. They would not be permitted to take advantage of their own wrong.

Another branch of this objection relates to the existence of the Republic Fire Insurance Company.

It will be observed that the objection is not that the evidence is inadmissible. It will hardly be contended that it does not tend to prove the existence of the corporation for

some purpose. It will be further observed that this is not a proceeding to test the existence of the corporation and its right to exist; nor is it an action by the corporation in which its legal existence is denied. In such cases strict proof is required. In this case, while it is necessary to prove that such a corporation exists, a *de facto* existence is sufficient. It is not necessary to prove an existence *de jure*. Neither is it necessary to introduce all the evidence that can be obtained. If the evidence is sufficient to satisfy the trier, that is all that is required.

A careful analysis of the objection and the facts of the case will tend still further to show that this objection is not tenable. It is not essential to prove the contents of the charter of the corporation. If it be shown to the satisfaction of the court that there was a charter, that under it a company was organized, and that, as such, it was actually doing business, nothing more is required. Now proof of the charter alone is not enough. That does not prove an organization and the transaction of business. Further proof of those facts is still required. Proof of an organization, while it does not prove the transaction of business, does tend to prove a charter or authority to organize. But when it is shown that an organization is actually doing business as a corporation, and has done so for a series of years unmolested and unquestioned, it is evidence that such an organization has a rightful existence. Now in this case, in addition to this evidence we have the fact that the prisoner himself transacted business with this organization as a corporation. That of itself is *prima facie* proof of the corporate existence in this case. *United States v. Amedy*, 11 Wheat., 392. We have also the further fact that the insurance commissioner has issued to certain persons claiming to be the agents of this corporation a certificate certifying that said corporation has "complied with all the laws of this state so far as the same are applicable to fire and marine insurance companies incorporated by or organized under the laws of other states of the United States," and thereupon said agents are authorized to transact fire insurance business in this state for the current year. By a

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reference to the statute it will be seen that foreign insurance companies are required to deposit with the insurance commissioner a copy of the charter, and a sworn statement of its officers, before he can lawfully issue such a certificate. Such certificate therefore is sufficient proof *prima facie* of an incidental fact of this nature; and taken in connection with the other proof alluded to, in the absence of any conflicting evidence, abundantly justified the court below in finding the fact proved without requiring a copy of the charter.

Besides, the statute does not require that another should be actually defrauded, nor does it require, when the person intended to be defrauded is a corporation, that the corporation should be in every respect legal. The offense is complete if there be an intent to defraud an actual corporation. Hence proof of a *de facto* corporation is sufficient. The familiar law applicable to forgeries and counterfeiting and to crimes committed upon officers, has some analogy to the case at bar. Strict proof that the officer was duly commissioned or that the bank or other corporation was a corporation *de jure* is not required.

The case of the *United States v. Amedy, supra*, is directly in point. In that case an act of Congress provided "that if any person shall, on the high seas, wilfully and corruptly cast away, &c., any ship or vessel, of which he is owner, &c., with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite, any policy or policies of insurance thereon, &c., the person or persons offending therein, &c., shall suffer death." The charter of the company was duly proved by an exemplified copy. It was objected that it was not shown that the company was duly organized by the subscription to the stock and the payment of such subscription as required by the charter. The court held that that was not necessary. It was further objected that the policy ought to have been proved to be executed by the authority of the company in such manner as to be binding on them. The court held that the actual execution of the policy by the known officers of the company *de facto* was sufficient. The court below instructed the jury, "that it was not material

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whether the company was incorporated or not; and it was not material whether the policy was valid in law or not; that the prisoner's guilt did not depend upon the legal obligation of the policy, but upon the question whether he had wilfully and corruptly cast away the vessel, as charged in the indictment, with intent to injure the actual underwriters." That charge was sustained by the court. Story, J., says: "The law punishes the act when done with an intent to prejudice; it does not require that there should be an actual prejudice. The prejudice intended is to be to a person who has under-written, or who shall under-write, a policy thereon, which, for aught the prisoner knows, is valid; and does not prescribe that the policy should be valid, so that a recovery could be had thereon. It points to the intended prejudice of an under-writer *de facto*."

There was no variance. The allegation that the company insured said building to the prisoner against loss by fire was fully sustained by the proof. The fact that the policy on its face was made payable to the mortgagee was not inconsistent with the allegation.

The question relating to the intent was a question of fact. In behalf of the prisoner it is claimed that the intent cannot be inferred from the mere act of burning. This is doubtless so; but in this case there was other evidence, and from all the evidence in the case the court found the criminal intent, and that finding is conclusive.

A new trial is not advised.

In this opinion the other judges concurred; except PARK, C. J., who having tried the case in the court below, did not sit.

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CORNELIUS BRENNAN vs. THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY.

The plaintiff, a boy ten years of age, was riding free on the front platform of a horse-railroad car, with the knowledge of the conductor and driver, the latter having requested him to hand in a package at a place they were to pass. Before quite reaching the place for stopping for this purpose, the plaintiff jumped off the platform and fell under the car and was badly hurt. A printed notice was posted conspicuously in the car, forbidding passengers to stand upon, or get on or off at, the front platform, or to get on or off the car when in motion, and declaring that the company would not be responsible for any accident happening thereby. In an action against the company for the injury the court below found that it was caused by the careless driving and management of the car, that the plaintiff in getting off under the circumstances used as much care as could be expected from a person of his age, and that no contributory negligence on his part was proved. Held, on a motion of the defendants for a new trial—

1. That the conclusion of the court upon the question of negligence was one of fact, which could not be reviewed by this court.
2. That it was within the scope of the authority of the conductor and driver to receive and let off the plaintiff as a passenger, and that it did not alter the case that the conductor did not require him to pay fare.
3. That, even if the driver was not authorized to deliver the package nor to employ the plaintiff to do it, yet evidence that he requested him to carry it in was admissible on the question of negligence, to show that he knew that the plaintiff was on the car and was intending to get off at the place in question.
4. That the averment that "the defendants so negligently managed the car as to run it upon and over the plaintiff," was sufficient to admit proof that the negligence consisted in not stopping the car at the proper time.
5. That even if the plaintiff was to be regarded as a trespasser in the car, that fact would not necessarily defeat his right of action.
6. That a special duty devolved upon the conductor and driver in view of the fact that the plaintiff was so young, to see that the rule forbidding him to stand on the front platform, or get off from it, was observed by him.

TRESPASS ON THE CASE for an injury to the plaintiff through the negligence of the defendants, a horse railroad company, brought to the Superior Court in New Haven County, and heard in damages, after demurrer overruled, by *Hitchcock, J.* The court made the following finding of facts:

At the time of the injury complained of the plaintiff was nine years and eleven months old; he was of ordinary mental capacity, and could read and write.

The defendants were a corporation, legally created, and as

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such were operating a horse railroad from the city of New Haven, its western terminus, to Fair Haven, its eastern terminus.

On the morning of September 23d, 1872, about seven o'clock, as the car of the defendants was running to its eastern terminus, and was within half a mile of it, the plaintiff, who was well known to the driver of the car, asked the latter if he might ride on the car; the driver assented, and the plaintiff thereupon got on the east platform of the car with the driver, for the purpose of riding to the Fair Haven post office, to find the man from whom he received papers to distribute, which was less than a quarter of a mile distant. He was a newspaper carrier. While on the platform, as the car was approaching the post office, the driver requested the plaintiff to take a package of newspapers, then lying on the platform, and deliver it at the Fair Haven post office, which the car was about to pass; and the plaintiff manifested to the driver his willingness to do so. The driver did not stop nor slacken the speed of the car as it came near or arrived at the post office; and it was then going so fast that the plaintiff did not get off, but he kept on with the car to the eastern terminus of the road, (which was but a short distance,) where the horses were unhitched from the east end of the car and hitched to the west end of it, and started westward for New Haven, the plaintiff being on the car, but intending to go back on it no farther than the post office.

Soon after the car had started westward for New Haven, the driver requested the plaintiff to bring the package from the east to the west platform of the car, which the plaintiff did; and at the same time he again requested the plaintiff to deliver the package at the post office.

When the car, on its westward course, arrived within about eight feet of the post office, the driver did not stop the car, but continued it at its ordinary speed. The plaintiff, under these circumstances, attempted to get off from the west end of the car at the post office, having at the time the package under his right arm, and with his left hand he had hold of an iron handle on the end of the car. In thus getting off the

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lower step of the west platform, the plaintiff was by the onward motion of the car swung under the forward wheel on the south side, which ran over his leg and caused the injury complained of. This injury was the result of the careless and negligent driving and management of the car by the defendants' driver and conductor. The plaintiff, in getting off the car under the circumstances, used as much care, caution and prudence as could be expected from a person of his age, and no contributory negligence on his part is found to have been proven. The first the driver or conductor knew of the plaintiff's having got off the car was by a signal to stop from a bystander. The car was then immediately stopped within a distance of half its length.

The driver knew that the plaintiff was on the car as it started on its return to New Haven, and the circumstances under which he was on the car, and that he intended to go no further on it than to the post office, and that he was there to deliver the package. There was no evidence as to whether the place where the plaintiff got off was a proper or improper one to get off, and no claim as to this was raised during the trial.

The plaintiff paid no fare but was riding free of charge. By the rules of the defendant company, neither the driver nor conductor had authority to carry or allow persons or packages on the car, without payment of fare or freight.

At the time of the injury the following notice printed in large type, was conspicuously posted at each end of the car:

PASSENGERS ARE FORBIDDEN—

- 1st. To get on or off, or to occupy, the forward platform.
- 2d. To occupy the rear platform when there is standing room inside.
- 3d. To stand on the steps, or get on or off the cars when in motion.
- 4th. To put their heads or arms out the windows.
- * * * * *
- 7th. The company will not be responsible for any accident occurring under a violation of any of the above rules.

Packages committed to the care of the company for conveyance were carried on the front platform, where the driver had to keep watch of them and see that they did not leave the car without his knowledge, though it was not his duty, but that of the conductor, to deliver the same.

By the rules of the company it was the duty of the driver to attend to his team, and to look ahead, and to the right and left for passengers; he had no duties as to passengers other than those of a prudent, careful driver, and neither he nor the conductor had any authority to allow transit of persons or property on the car free of fare or freight.

To all the evidence offered by the plaintiff to show that he was permitted to get upon and ride on the car by the driver and conductor, and with their knowledge and consent, past the post office to the eastern terminus, and thence back to the place where the injury occurred, the defendants objected, upon the ground that neither the driver nor conductor had power to give the plaintiff a free ride; that the driver had nothing to do with persons on the car; that neither was an agent of the defendants for any such purpose; and that there was no allegation in the plaintiff's declaration to which such evidence could be applied, or which it tended to establish; but the court overruled the objection and admitted the evidence.

The plaintiff, for the purpose of showing that he was not a trespasser on the car, but was there with the knowledge and permission of the defendants, and to show that the driver knew that he intended to get off at the post office, and was negligent in not stopping the car for him to get off, offered evidence to prove that the driver requested the plaintiff to take the package of newspapers, then on the platform, and deliver it at the post office, and that the plaintiff assented to the request, and that it was while he was getting off the car with the package that he was injured. To the admission of this evidence the defendants objected, on the ground that the driver was not their agent for the purpose of leaving papers at the post office, or requesting or employing the plaintiff to do so; and on the further ground that if the court should be of the opinion that the driver was their agent for such pur-

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pose, then his employment of the plaintiff, if within his authority, made the plaintiff his fellow-servant, for whose injury, in the manner above described, the defendants would not be liable; and on the further ground that the evidence was not relevant to any question presented by the plaintiff's declaration. The court overruled the objection and admitted the evidence.

The defendants claimed that under the facts they were not liable for the injury; that the plaintiff was a trespasser on the car, and that they owed him no duty, except not wantonly, (or by gross carelessness, tantamount to wantonness,) to injure him; that they did not owe him even that till aware of his presence on the car; that they owed him no duty to stop and let him get off till requested to do so, or at least till made aware that he proposed to get off where he did; and that it was of itself a negligent and careless act to get off the forward end of the car while the same was in motion. The defendants claimed that upon the undisputed facts in the case and upon the facts as found, as matter of law, they were not liable in this case. The court overruled these claims and rendered judgment for the plaintiff for full damages.

The defendants moved for a new trial for error in the rulings of the court.

The case was argued at a former term of the court, and re-argued at the present term by direction of the judges.

G. H. Watrous, in support of the motion.

1. Although the record shows a finding that the defendants' negligence caused the injury, yet facts are found which show clearly that there was no fault on their part. The court will assume the facts found to be all that bear on the case, or at least all that tend to support the conclusion arrived at by the court. *Young v. New Haven*, 39 Conn., 435. These facts do not tend to support the allegation of negligence. If the driver knew that the plaintiff intended to get off at the post office, that knowledge does not make it negligence not to stop *before he arrived at the post office*. Besides, no negligence in not stopping is alleged in the declaration. The averment

is that the car was "managed and directed upon and over the plaintiff." The car was in fact stopped as soon as the driver knew the plaintiff had attempted to get off. And he had not then reached the post office. Again, the driver had no right to stop the car except in obedience to a signal from the conductor's bell, or from a party desiring to get on the car. It was therefore the conductor's duty, if that of anybody, to cause the car to stop to let the plaintiff off, but the plaintiff had not informed him that he wanted the car stopped, or that he intended to get off. The decision of the judge, that the defendant was careless in not stopping, being without any foundation in the facts, is a legal *non sequitur*.

2. Whether these facts raised a duty is a question of law, or of mixed law and fact. *Derwort v. Loomer*, 21 Conn., 245; *Dimock v. Suffield*, 30 id., 129; *Lyndsay v. Conn. & Passumpsic Rivers R. R. Co.*, 27 Verm., 643; *Railroad Co. v. Skinner*, 19 Penn. S. R., 298; *Pennsylvania R. R. Co. v. Beale*, 73 id., 503; *Lake Shore &c. R. R. Co. v. Miller*, 25 Mich., 274; *Flemming v. Western Pacific R. R. Co.*, 49 Cal., 253; *Filer v. N. Y. Central R. R. Co.*, 49 N. York, 47; *Baulec v. N. York & Harlem R. R. Co.*, 59 id., 356.

3. It is equally clear from the finding that the plaintiff not only contributed to, but *caused*, his own injury. The court below says "no contributory negligence is found to have been proven." It is not found that the plaintiff did not contribute. This should be found to sustain the judgment below. *Lake Shore &c. R. R. Co. v. Miller*, *supra*; *Park v. O'Brien*, 23 Conn., 339; *Fox v. Glastonbury*, 29 id., 204; *Carey v. Day*, 36 id., 152. The court says that "the plaintiff, in getting off the car, under the circumstances, used as much care as could be expected of a person of his age." But he did not use any at all, as the finding shows. In violation of instructions before his eyes, he occupied, and got off from, the forward end of the car when in motion. He did not ask anybody to stop the car and let him get off. He did not even let any one know that he was about to get off, but jumped off backwards and before he reached the post office. Unless absolutely no

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care is reasonable care in a boy ten years old, he did not use as much care as under the circumstances could be expected. *Lake Shore &c. R. R. Co. v. Miller*, supra; *Nichols v. Middlesex R. R. Co.*, 106 Mass., 463; *Cram v. Metropolitan R. R. Co.*, 112 id., 38; *East Saginaw R. R. Co. v. Bohn*, 27 Mich., 503; *Brown v. European & N. Am. R. R. Co.*, 58 Maine, 384; *Baltimore City R. R. Co. v. Wilkinson*, 30 Maryl., 224; *Solomon v. Central Park &c. R. R. Co.*, 1 Sweeny, 298; *Hadencamp v. Second Avenue R. R. Co.*, id., 490; *Reynolds v. N. York Central R. R. Co.*, 58 N. York, 248; *Burrows v. Erie R. R. Co.*, 63 id., 556.

4. The plaintiff was not a passenger. He was in fact a trespasser on the car. At most, and by the finding, he was there by sufferance or license, paying no fare, and defendants did not owe him the duty they owed a passenger. This is purely a question of law. *Patterson v. Philadelphia &c. R. R. Co.*, 41 Houst., 103; *Union Pacific R. R. Co. v. Nichols*, 8 Kansas, 505; *Illinois Central R. R. Co. v. Godfrey*, 14 Am. Reg., 290; *Jeffersonville &c. R. R. Co. v. Goldsmith*, 7 Ind., Law 43; Shearm. & Redf. on Neg., §§ 262, 3, 4.

5. The assent of the driver that the plaintiff might get on the car and ride without paying fare, was not the assent of the company. The driver had no duty except to properly drive his team and look out ahead for passengers and a clear track. Neither he nor the conductor had any power to grant a free ride, nor was it within the scope of the apparent power of either of them, certainly not within that of the driver. The conductor did not even know that the boy was on the car, and hence could not have assented to his being there, even if his assent could bind the company. His duties were to collect fares and cause the car to stop for passengers to get on or off. He had no other. Hence the assent of the driver did not change the relation of the plaintiff to the defendants, or impose on the defendants the duty to treat him as a passenger. *Thames Steamboat Co. v. Housatonic R. R. Co.*, 24 Conn., 40; *Crocker v. New London &c. R. R. Co.*, id., 249; *Swazey v. Union Manf. Co.*, 42 id., 556; *Stephenson v. N. York & Harlem R. R. Co.*, 2 Duer, 343. The driver had no

power to leave a package for the defendants at the post office and no power to engage the plaintiff so to do, and his act in that behalf was not the act of the defendants; and if the driver was careless in this respect that carelessness cannot be imputed to the defendants. A car driver is not a *general* agent. In this aspect of the case the driver employed the plaintiff to do an act which he, as driver, had no power to do, and in connection with that employment was guilty of neglect towards the plaintiff. *Wilson v. Peverly*, 2 N. Hamp., 548; *Elkins v. Boston & Maine R. R. Co.*, 23 id., 275; *Oxford v. Peter*, 23 Ill., 434; *Wright v. Wilcox*, 19 Wend., 343; *Bristol Knife Co. v. First Nat. Bank*, 41 Conn., 421; *New Orleans &c. R. R. Co. v. Harrison*, 48 Miss., 112; Shearm. & Redf. on Neg., §§ 63, 64.

6. The evidence objected to should have been excluded. 1st. If the driver had no power to give the plaintiff a free ride, then proof that he knew of and assented to his riding did not tend to show that the plaintiff was on the car by permission of the defendants. 2d. If the driver had no power to leave papers at the post office, or to employ the plaintiff to do so, then proof that he did so employ him did not tend to show either that the defendants were careless in the management of the car, or that they permitted the plaintiff to ride free. 3d. The admission of this evidence to show that defendants were careless "in not stopping their car" was clearly wrong; for there is no allegation in the declaration of any omission of duty in this regard, and the plaintiff can only recover "*secundum allegata et probata*." Gould's Pl., 160, § 7; *Douglass v. Chatham*, 41 Conn., 237.

7. The court below erred in disregarding the claims made by the defendants as to their non-liability upon the facts proved. 1st. The plaintiff was riding without paying fare and without the knowledge or consent of the defendants. That made him a trespasser, and as a matter of law the defendants owed him no duty except as stated, and of course did not owe him that till aware of his bodily presence on the car. What right had the court to disregard this claim? The defendants were at least entitled to have this claim con-

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sidered in connection with the question whether the plaintiff was injured by their negligence, or his own, or by inevitable accident. 2d. The defendants claimed "that they owed the plaintiff no duty to stop and let him off till requested to do so, or at least till made aware that he proposed to get off when he did." There is nothing in the facts as found, to justify the court in disregarding this claim. The finding shows that the car was moving at its ordinary speed, was on the bridge, had not reached the post office, and that neither the driver nor the conductor knew he was going to get off, or that he had got off till a by-stander called out. 3d. It was negligence *per se* for the plaintiff to jump off the forward end of the car moving at its ordinary speed, without at least asking to have it stopped, and without any notice of a purpose so to do. The plaintiff was, at all events, so far *sui juris* as to know enough to be trusted abroad by his guardian, and to keep out of the way of obvious danger.

T. E. Doolittle and W. L. Bennett, contra.

1. By the law of Connecticut the question of negligence is one of fact, to be decided by the jury, and is not one of law for the court. *Beers v. Housatonic R. R. Co.*, 19 Conn., 566; *Park v. O'Brien*, 23 id., 339; *Young v. City of New Haven*, 39 id., 435. Where, upon this point, the law of negligence in other states differs from that in this state, it may be stated as follows: the question of negligence is one of mingled law and fact, to be decided as a question of law by the court when the facts are undisputed or conclusively proved, but to be decided as one of fact by the jury when the facts are disputed and the evidence is conflicting. *Eckert v. Long Island R. R. Co.*, 43 N. York, 502; *Filer v. N. York Central R. R. Co.*, 49 id., 47; *Belton v. Baxter*, 58 id., 411; *Thurber v. Harlem Bridge &c. R. R. Co.*, 60 id., 326; *Gaynor v. Old Colony R. R. Co.*, 100 Mass., 208; *Mayo v. Boston & Maine R. R. Co.*, 104 id., 137; *Brooks v. Somerville*, 106 id., 271; *Sleeper v. Sandown*, 52 N. Hamp., 244; *State v. Manchester & Lawrence R. R. Co.*, id., 563; *O'Flaherty v. Union R. R. Co.*, 45 Misso., 70; *Schierhold v. North*

Beach &c. R. R. Co., 40 Cal., 447; *Detroit &c. R. R. Co. v. Von Steinberg*, 17 Mich., 118; *Railroad Co. v. Gladmon*, 15 Wall., 401; *Railroad Co. v. Stout*, 17 id., 659; Wharton on Neg., § 420. We submit that in a case like the present, where the evidence was conflicting, and nothing was admitted, the question of negligence is one of fact by the law of other states as well as of our own. It has been decided in this case by the tribunal whose duty it was to find the facts. There is no question of law in regard to it before this court. Nor is there here a question of fact. And if this court of law would, at the request of the defendants, try the question of fact whether the defendants were negligent or not, it has no full statement of evidence before it upon which to render a verdict. The court below examined all the evidence, and from it found the fact of negligence. This evidence is not spread out upon the record. We call the attention of the court to the following cases, in which the facts were almost exactly the same as in this. *Hestonville &c. R. R. Co. v. Fray*, Penn. S. C. Weekly Notes of cases, March 15, 1877; *Pittsburg &c. R. R. Co. v. Caldwell*, 74 Penn. S. R., 421; *Crissey v. Hestonville &c. R. R. Co.*, 75 id., 83; *Phil. City Railway Co. v. Hassard*, id., 367; *Wilton v. Middlesex R. R. Co.*, 107 Mass., 108; *East Saginaw City R. R. Co. v. Bohn*, 27 Mich., 503.

2. All the evidence offered by the plaintiff to show that he was permitted by the conductor and driver to ride upon the car was admissible, in the first place, as showing the permission of the defendants. The driver and conductor were the only persons in charge of the car. It was their duty to receive persons upon the car, and in receiving the plaintiff they acted within the scope of their employment, even though they disobeyed instructions in not demanding fare. *Wilton v. Middlesex R. R. Co.*, 107 Mass., 108. When the servant, as in this case, acting within the general and apparent scope of his employment, disobeys a direct command of his master, he notwithstanding makes his master responsible for his acts. *Bayley v. Manchester &c. R. R. Co.*, L. R. 8 C. P., 148; *Lackawanna &c. R. R. Co. v. Chenewith*, 52 Penn. S. R.,

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382; *Pittsburgh &c. R. R. Co. v. Caldwell*, 74 id., 421; *Philadelphia &c. R. R. Co. v. Derby*, 14 How., 468; *Drew v. Sixth Av. R. R. Co.*, 26 N. York, 49. If the plaintiff was upon the car with the direct assent of the driver and in full sight of the conductor and was permitted by both to remain, he was not a trespasser. Is there no distinction between the rights of a person who steals a ride unknown to the officers of a car, and those of one who openly and with their consent takes his place upon it but pays no fare? If there is the evidence was admitted rightly. *Wharton on Neg.*, § 354; *Carroll v. N. York & N. Haven R. R. Co.*, 1 Duer, 571; *Jacobus v. St. Paul & Chicago R. R. Co.*, 20 Minn., 125, 134; *Dunn v. Grand Trunk R. R. Co.*, 58 Maine, 187; *Columbus &c. R. R. Co. v. Powell*, 40 Ind., 37; *Great Northern R. R. Co. v. Harrison*, 10 Exch., 376; *Austin v. Great Western R. R. Co.*, L. R. 2 Q. B., 442.

3. But if we waive all question whether the permission of the officers of the car could change the position of the plaintiff from trespasser to passenger, and admit that he was a trespasser, the evidence is still admissible as bearing upon the negligence of the driver and conductor. Even if the plaintiff was a trespasser and continued as such, he was not withdrawn from the protection of that rule which requires that no person shall negligently injure another. *Lovett v. Salem &c. R. R. Co.*, 9 Allen, 557; *Pittsburgh &c. R. R. Co. v. Donahue*, 70 Penn. S. R., 119; *Rounds v. Delaware &c. R. R. Co.*, 64 N. York, 129; *Northwestern R. R. Co. v. Hack*, 66 Ill., 238; *Lynch v. Nurdin*, 1 Adol. & El., N. S., 29. The law is perfectly well settled in Connecticut. *Johnson v. Patterson*, 14 Conn., 1; *Birge v. Gardiner*, 19 id., 507; *Daley v. Norwich & Worcester R. R. Co.*, 26 id., 591; *Isbell v. N. York & N. Haven R. R. Co.*, 27 id., 393; *Woolf v. Chalker*, 31 id., 121. If, therefore, the plaintiff was a trespasser the defendants could not negligently drive over him without liability. The knowledge of the driver and conductor that the plaintiff was upon the car and that he intended to get off at the post office was important to be shown, not in this view of the case as giving the permission

of the company, but as bearing upon the question of negligence.

CARPENTER, J. The plaintiff at the time of the accident was ten years old. He was riding on one of the defendants' cars with the knowledge and consent of the conductor and driver, but without paying fare. He was requested by the driver to take a package of newspapers, which was being carried upon the car, and leave it at the post office in Fair Haven, where the boy intended to get off. He took the papers, and without notice to the conductor or driver, and while the car was in motion, before reaching the crossing where the car usually stopped, stepped off at the forward end of the car, and in doing so was thrown under the wheel and received the injury complained of. The managers of the car had no authority to carry passengers free. A notice was conspicuously posted in the car, printed in large letters, forbidding passengers, among other things—"1. To get on or off, or to occupy the forward platform." * * "3. To stand on the steps, or get on or off the cars when in motion." And at the close was the following:—"The company will not be responsible for any accident occurring under a violation of any of the above rules."

The court found, "that this injury was the result of the careless and negligent driving and management of the car by the defendants' driver and conductor of the same. The plaintiff in getting off the car, under the circumstances, used as much care, caution and prudence as could be expected from a person of his age, and no contributory negligence on his part is found to have been proven."

The court rendered judgment for the plaintiff, and the defendants moved for a new trial.

Before considering the main question in the case we will briefly notice the objections to evidence.

To the evidence offered by the plaintiff to show that he was permitted to ride on the car by the driver and conductor, the defendants objected, "upon the ground that neither the driver nor conductor had power to give the plaintiff a free

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ride, and the driver had nothing to do with persons on the car; that neither was an agent of the defendants for any such purpose."

We think this objection is not well taken. The defendants' car was managed and directed by the conductor and driver. It was within the scope of their authority to receive passengers on the car and let them off. Their action was the action of the company. The defendants therefore received the plaintiff as a passenger. This fact cannot be affected by the omission of the conductor to collect fare. Moreover the matter thus proved was a part of the *res gestæ*; it shows the time and manner of the accident and the circumstances attending it.

The plaintiff, for the purpose of showing that he was not a trespasser on the car, but was there by the knowledge and permission of the defendants, and to show that the driver knew that the plaintiff intended to get off at the post office, and was negligent and careless in the management of his team, and in driving the car, and in not stopping for the plaintiff to get off, offered evidence that the driver requested the plaintiff to take a package of newspapers then on the platform, and deliver it at the post office; and that while the plaintiff was getting off the car with the package he was injured. This evidence was objected to on the ground that the driver was not the agent of the defendants for the purpose of leaving papers at the post office, or requesting or employing the plaintiff to do so.

We think this evidence was admissible for some or all of the purposes for which it was offered. It seems that the defendants were accustomed to carry packages and parcels on their car, and that both the conductor and driver had some duty to perform in respect to them. Admitting it to be true, as the objection assumes, that the driver was not authorized to leave the papers at the post office, or to employ the plaintiff to do so, still the evidence was admissible to show that the driver knew that the plaintiff was on the car, and was intending to get off at the post office; and we think that such knowledge has some bearing upon the question of negligence.

The objection that requesting the plaintiff to take charge of the papers constituted him an employee of the defendants, if true, is hardly a reason for excluding the testimony. It was still admissible for the purposes for which it was offered. But we do not consider that the plaintiff was in any sense an employee of the defendants. He was merely requested, as any other passenger might have been, as a friendly act, to deliver the papers. That did not constitute the relation of master and servant.

The objection that the declaration avers no negligence "in not stopping the car" cannot avail the defendants. It is alleged that the defendants "so carelessly, negligently and unskillfully managed and directed said car as to run said car upon and over the plaintiff." That is certainly broad enough to admit proof that the negligence consisted in part in not stopping the car at a proper time.

We now come to the principal and most important question in the case—the claim of the defendants that the facts found show, as matter of law, that the defendants were guilty of no negligence, and that the plaintiff was guilty of contributory negligence; and that the finding to the contrary by the Superior Court should under the circumstances be disregarded.

If the finding of negligence on the one hand and of due care on the other was merely a conclusion of law from the facts stated, then this would have been a legitimate question for us to consider. If on the contrary negligence and due care are simply questions of fact, then the case is placed beyond our reach by the finding.

Negligence is ordinarily a question of fact and has been so considered by this court. Sometimes however it has been treated as a mixed question of law and fact, especially in cases reserved, and the questions raised have been heard and determined. We think it must be regarded as a question of fact here. If however it were to be considered as a mixed question of law and fact, we should even then find it difficult upon any recognized principles to disturb the judgment.

If it be admitted that the plaintiff was a trespasser on the defendants' car his right of action is not necessarily thereby

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defeated. But it is unnecessary to discuss this question, as we think he can hardly be viewed in the light of a trespasser. He was rightfully on the car—was there by the consent of the defendants' servants. They had a right to collect fare, and as between themselves and their employers it was their duty to do so. Their neglect of this duty did not make him a trespasser, and did not relieve them of the obligation to use reasonable care not to injure him.

In the facts as they appear there is some evidence of negligence. Negligence is a relative term. Conduct which might be negligent at one time or in respect to one person, might not be at another time or in respect to another person. Much necessarily depends upon the condition and circumstances of the parties. If the plaintiff had been an adult perhaps the notice posted at each end of the car, forbidding passengers to get on or off the forward platform or while the cars were in motion, and that the company would not be responsible for accidents occurring in consequence of any violation of these rules, would have been all that would have been required of them. There is room for the presumption that he could read the notice, and that he did read it, and that he had sufficient judgment and discretion to heed it. But the case before us is that of a mere child. He may or may not have read the notice. If he read it he may not have comprehended it. If he comprehended it the thoughtlessness of childhood may have caused him immediately to forget it and consequently to disregard it. Under these circumstances there was some obligation resting upon the driver and conductor to see that these rules were complied with.

It is perfectly natural for a boy of that age, if allowed to do as he pleases, to disregard such rules. Some restraining authority seems to have been called for in this case and none was exercised. Thus it would seem that there may have been negligence in managing and directing the car in respect to this boy, while the same circumstances in respect to a person of mature years would not constitute negligence. An adult might have stepped off the car with impunity, and the driver might properly have allowed him to judge and act for him-

self. Not so with this boy. He knew he was on the front platform in violation of the rule. Had he enforced the rule and sent him inside the car probably the accident would not have happened. He knew also that the boy intended to get off the car. If, instead of sending him inside, he had allowed him to get off but had restrained him until he had stopped the car, then there would have been no accident. So too if the conductor had looked after the plaintiff he might easily have been kept within the rules and the accident have been prevented.

These remarks are applicable to some extent to the other branch of the case—due care on the part of the plaintiff. It is found that he “used as much care, caution and prudence as could be expected from a person of his age.” Conduct which might ordinarily be expected from such a boy might be negligence in an older person.

But whether the court erred in arriving at conclusions of fact is immaterial. We are unable to see that it erred in the application of legal principles.

A new trial must be denied.

In this opinion the other judges concurred.



CHARLES MONSON AND ANOTHER *vs.* LOUISE E. BEECHER.

The defendant, a married woman living with her husband, executed a promissory note to the plaintiffs, who afterwards brought suit against her upon it; the declaration containing a special count on the note and the common counts in assumpsit. A rule of the court required all pleas to be filed at the first term and provided that all cases in which it was not done should be regarded as standing on the statute general issue without notice. No plea was filed at the first term. Upon the trial at a later term the plaintiffs filed the note as a bill of particulars under the common counts, and claimed to recover only thereon. Held—

1. That the coverture of the defendant was a matter that could not be proved under the general issue without notice.
2. That the filing of the note under the common counts was not such an amend-

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ment of the declaration as allowed the defendant to amend her plea without cost.

ASSUMPSIT on a promissory note, brought to the Court of Common Pleas of New Haven County, and tried to the court before *Peck, J.* Judgment for plaintiffs and motion for a new trial by defendant. The case is fully stated in the opinion.

D. R. Wright, in support of the motion.

W. C. Case and *L. P. Deming*, contra.

PARDEE, J. Upon the 7th day of August, 1875, the defendant, Mrs. Beecher, then having and living with a husband, executed and delivered to the plaintiffs her promissory note for \$258. This not being paid at maturity the plaintiffs brought an action thereon. The declaration contained a special count upon the note, together with the common counts in general assumpsit. The writ was made returnable to the Court of Common Pleas for New Haven County at the June term, 1876; thence the cause came by legal continuances to the October term, 1877. The defendant appeared at the return day, but filed no plea during the first term. A rule of the court provides that "the plea must in all cases be filed during the first term, and the pleadings must be closed before the opening of the second term. Cases in which the plea is not so filed will, in the absence of special order, be considered as standing on the statute general issue, without notice." No special order was made in this case.

Upon the trial at the October term, 1877, the plaintiffs claimed to recover only upon the note, and offered to file the same as their bill of particulars. The defendant objected, insisting that the original note declared upon could not be used for that purpose. The court permitted it to be done; and to this exception was taken.

The defendant then claimed that this act of filing the note operated as an amendment of the declaration, and thus gave her an opportunity to change her plea of the general issue without notice to a like plea with notice of her coverture,

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under the statute allowing change of plea to follow change of declaration. The court refused to permit her to change her plea except upon payment of costs; and to this exception was taken.

The plaintiffs, having offered the original note in evidence, and one of them having testified that they owned it, that it was due and unpaid, and was the note on which the suit was brought, rested. The defendant then offered evidence to prove the coverture, under the general issue. The plaintiffs objected, and the court refused to admit it and rendered judgment for them; the defendant filed a motion for a new trial.

In this case the pleader followed the form usually adopted in framing declarations in actions upon promissory notes; he declared specially in one count upon the note and added the common counts as a matter of prudence, that he might thereby save a verdict even if there should occur a fatal variance between the evidence and the special count. Upon the trial the original note was offered in evidence and a statement was made that it was the only claim upon which judgment would be asked. Thereby nothing was added to or taken from the declaration. The plaintiffs did not say that they should strike out the common counts; they simply explained that no other use would be made of them than to save a bill of costs upon a possible variance. This is not an amendment in any such sense as to entitle the defendant to change her plea.

The statute, Revision of 1875, sec. 10, page 424, provides that under the general issue the defendant shall not "give in evidence any matter in avoidance, or any defence consistent with the truth of the material allegations in the declaration, unless at the time of pleading he shall file notice thereof in writing, &c.;" and the defendant insists that by reason of her coverture she had not the legal capacity to make the promise embodied in the note; that there can be no such thing as an avoidance of that which never existed, and therefore that the court erred in refusing permission to prove that coverture under the general issue.

Of fraud as a defence, in connection with this statute, in *Hoxie v. Home Insurance Co.*, 32 Conn., 21, the court said: "The fraud of the master was barratry, (notwithstanding he was part owner,) and a peril insured against, unless the other owner or the plaintiff assented to it. It was essential to the intended defence therefore, that either the original combination or the subsequent assent should be proved. The one goes to show that the contract, although *primâ facie* valid, was void; the other, that the evil practice of the master, which was *primâ facie* barratry, was not such, but the fraud of the other owner and the plaintiff also; and both were matter of avoidance, and should have been inserted in the notice. The action is assumpsit on an express contract, and doubtless under the rules of the common law as gradually relaxed from their original strictness, and existing prior to the statute of 1848, would be admissible under the general issue alone. But that statute changed the common law in that respect, and since its passage fraud, if relied upon, must be set up. If there is an apparent distinction between fraud which goes to the original validity of the contract, and fraud which operates in avoidance of it after its execution, that distinction is not real and seems to be practically disregarded in the recent rules incorporated into the English practice.

* * * And so, according to the construction given by us to the statute in the recent case of *Mahaiwe Bank v. Douglass*, 31 Conn., 170, the evidence of fraud was clearly matter of avoidance also, and within it. There we held the evidence admissible under the general issue, because it showed that the contract set up never was *in fact* executed by the defendant. Here the execution of the contract is conceded, and the defence should have been set up in the notice; and for that reason the testimony was rightfully excluded." What is there said of fraud may be said here with equal force of coverture; each is present at the inception of the contract; but the interpretation by the court of the statute suggests that it disregards the distinction between void and voidable contracts, and requires this defendant, if, after having put her name to a promissory note, she intends to rely upon her

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coverture as a defence against the consequences of that act, to give warning thereof in writing when pleading.

One of the English rules, adopted in 1834, provides that "in every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge but those which show the transaction to be either *void* or *voidable* in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.*, infancy, coverture, * * and various other defences must be pleaded;" herein expressly placing void and voidable contracts upon the same basis, for this particular purpose. Mr. Chitty says that these rules put an end to the misapplication and abuse of the general issue, and compel a defendant in terms to deny particular parts of the declaration and to plead specially every matter of defence not merely consisting of denial of the allegations in it.

An act of Parliament, 16 and 17 VICTORIA, c. 113, sec. 70, provides that every defence which admits a contract in fact, but relies upon matter in avoidance or discharge or illegality, on the ground of fraud or otherwise, as for instance infancy, coverture, &c., shall be pleaded specially.

For the purpose of placing limitations upon the general issue coverture seems to have been classed in England, in rule and statute, as matter in avoidance; and thus it should be under our own statute.

There should be no new trial.

In this opinion the other judges concurred; except CARPENTER, J., who did not sit.

 GEORGE K. WHITING vs. THE CITY OF NEW HAVEN.

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172	400

The charter of the city of New Haven provides that the common council, in taking land for a street, under the power given it to lay out streets, shall give notice, and afterwards make compensation, to the "owner" of land so taken. Held that, where land so taken is covered by a mortgage, the mortgagor and

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not the mortgagee is the owner of the land within the meaning of the charter, and that after notice has been regularly given and compensation made to the mortgagor, the city is not liable to the mortgagee.

PETITION in chancery, to compel the respondent city to pay to the petitioner, a mortgagee of certain land taken for the extension of a city street, compensation for the land so taken; brought to the Superior Court, and reserved, upon a demurrer to the petition, for the advice of this court. The case is sufficiently stated in the opinion.

L. N. Blydenburgh, in support of the demurrer.

L. E. Munson, contra.

GRANGER, J. This is a petition in equity in which the petitioner alleges that he was the mortgagee of certain lands described in the petition, and that the court of common council for the city of New Haven ordered an extension and lay-out of Gilbert Avenue so called, which extension according to the order carried the street through the land mortgaged to the petitioner, thereby diminishing his mortgage security; that he had no notice of such lay-out and extension, and no notice of the meetings of the board of compensation, and that he was ignorant of the doings of the city in the premises until after it was too late to take an appeal; and praying that the city be required to restore the land or pay the petitioner the amount of the impaired value of his security, or that other proper relief be granted. To this petition the city demurred, and the case is reserved for the advice of this court.

The chief question presented by the record is, whether the petitioner was the owner of the land through which the street was laid, within the meaning of the law and the charter of the city.

The 24th section of the charter empowers the common council to order streets to be laid out. Section 25th provides that before laying out such streets the board of road commissioners of the city shall cause reasonable notice to be given to all "owners of land," proposed to be taken for such street, at

least six days before the time fixed for hearing, that they may appear and show cause against the lay-out. Section 26th provides that just compensation shall be made to the person "whose property has been taken" for such improvements before "said land" shall be taken and devoted to the public use. Section 27th provides that all damages done to any "owner of land," by the taking of "such land" for public use, shall be assessed, &c., after due notice given to such "owner" to appear before the board of compensation and be heard in reference thereto.

If the petitioner was the owner of the land taken, then he was entitled to the notice provided for in the city charter. Was he the owner of the land?

This question is very narrow, and admits of little discussion. In the case of *City of Norwich v. Hubbard and others*, 22 Conn., 587, CHURCH, C. J., in giving the opinion of the court, says: "A mortgagee out of possession is not the proprietor of the mortgaged premises, and in common parlance is never spoken of as such; nor is he so recognized in a legal sense. In truth the mortgagee has only a lien and cannot be considered or treated as a proprietor or owner of the mortgaged estate." This view is corroborated by analogous cases. In laying out new highways, either by the selectmen or by the county courts, or in repairing old ones, no provision is made by law for notice to be given to mortgagees, nor in practice is this ever done. The interests of mortgagees are not regarded in these proceedings; they are necessarily connected with the interests of the mortgagor, and in this respect subject to them. See also *Mills v. Shepard*, 30 Conn., 101.

Does the charter of the city of New Haven or any other law require notice to be given to a mortgagee in a case of this kind?

The charter does not in terms require any notice to be given to the mortgagee; it only speaks of the "owner" of the land, and requires notice to be given to "such owner." It is true that in section 26 it is provided that just compensation shall be made to the person whose "property" is taken for such improvements before the land shall be taken or devoted

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to public use. But we think the word "property" in this section is used in place of the word "land," and that no such distinction can be made as is claimed by the petitioner, that property in this connection means something different from land, and that the interest of the mortgagee was meant to be protected by the use of this term. This would be a forced construction of the language used in the section of the charter referred to. If it was intended by the legislature when the charter was passed, that a mortgagee should be notified, it is but reasonable to suppose that appropriate words would have been used for that purpose.

The petitioner was not the owner of the land, and as neither the charter nor any other law requires that the petitioner should have had notice of the action of the city, we cannot require it without the exercise of powers which we do not possess.

The Superior Court is therefore advised that the petition is insufficient.

In this opinion the other judges concurred; except CARPENTER, J., who did not sit.

FRANCES E. WHEELER'S APPEAL FROM PROBATE.

The commissioners on an insolvent estate of a deceased person made their report and no appeal was taken within the twenty one days allowed by law. A month after the time for appealing had expired the General Assembly passed a special act allowing appeals to be taken from the doings of the commissioners on that estate within twenty-one days after the rising of the Assembly. Held that the act was constitutional and valid.

The act (Gen. Statutes, tit. 18, chap. 11, sec. 15,) allowing appeals from probate to be taken to the "next term of the Superior Court," is not repealed by the acts of 1876, (Session Laws of 1876, p. 100, sec. 3,) and of 1877, (Session Laws of 1877, pp. 182, 202,) which allow appeals from probate to be taken to the Superior Court on the first Tuesday of every month except July and August.

45	306
50	83
45	306
68	135
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67	465
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69	74
69	584
69	606

Wheeler's Appeal from Probate.

APPEAL from the doings of commissioners on the estate of George B. Wheeler, deceased, in allowing a claim of one Antoinette M. Wheeler; brought to the Superior Court in New Haven County. The report of the commissioners was returned to the probate court on the first day of February, 1877, and the appeal was taken on the 12th day of April, 1877, and to the Superior Court to be holden on the 2d Tuesday of September, 1877.

The appellee pleaded in abatement—1st, that the appeal was improperly taken to that term of the court; and 2d, that it was taken more than twenty-one days after the return of the commissioners' report. The appellant demurred to the first part of the plea, and replied to the second part, that the General Assembly, at its January session, 1877, by a resolution approved March 22, 1877, authorized an appeal to be taken from the doings of the commissioners on said estate at any time within twenty-one days after the rising of the Assembly, and that the appeal was taken within that time. To this replication the appellee demurred.

The case upon these pleadings was reserved for the advice of this court.

The following is the resolution of the General Assembly referred to:

"GENERAL ASSEMBLY, JANUARY SESSION, 1877.

"Concerning Estate of George B. Wheeler.

"*Resolved by this Assembly*, that appeals may be taken from the doings of the commissioners upon the estate of George B. Wheeler, late of Milford, deceased, at any time within twenty-one days from the rising of the General Assembly."

A. S. Treat and *C. Sherwood*, for appellant.

First. The appellee claims that the appeal should abate because there were more than fifteen weeks from the date of the appeal to the term of the court to which it was taken. Prior to 1877 appeals from probate were required to be taken, as this was, to the *next term* of the Superior Court. In 1876 it was enacted that process in civil actions might be brought

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before the Superior Court in this county on the first Tuesday of every month, except July and August, provided the return was not more than eleven weeks from the date of such process; and in 1877 the time was extended from eleven to fifteen weeks. It was also enacted that the words "process in civil actions" should be held to include appeals from probate, and that such appeals might be taken to the Superior Court on the first Tuesday of each month, except July and August, as well as to the next term, without any limitation in regard to the return day. So that now, we contend, appeals may be taken either way at the option of the appellant.

Second. It is claimed that the resolution of the General Assembly is unconstitutional. If so it must be for some one or more of three reasons: 1st. That it affects and impairs vested rights. 2d. That it is an act of special legislation. 3d. Or that it is a judicial act.

1. The rights of creditors are not vested if a new trial may be had. This appeal is in effect a new trial. Rights apparently vested may be impaired if it be manifestly just. *Goshen v. Stonington*, 4 Conn., 222; *City of Bridgeport v. Housatonic R. R. Co.*, 15 id., 495; *Lowrey v. Gridley*, 30 id., 458. Our legislature has done this in various ways, and, among others, by opening the doings of commissioners for good cause, such as fraud, mistake, &c.; by allowing the admission of wills to probate after ten years have elapsed; by granting pardons to criminals and allowing new trials; by validating appeals from justices of the peace; and by granting letters of administration after seven years have elapsed.

2. The General Assembly has exercised this power of special legislation in granting new trials from time immemorial. 1 Swift Dig., 786; *Hamilton v. Hempsted*, 3 Day, 338. It was never conferred upon the courts of probate, and was not limited by the constitution. *Calder v. Bull*, 2 Root, 352; Const., Art. 5, sec. 1. Where does the power exist but in the General Assembly? The constitution of Connecticut is a limitation and not a grant of power. *Starr v. Pease*, 8 Conn., 546; *Pratt v. Allen*, 13 id., 124; *Lowrey v. Gridley*, 30 id., 458. It will not be denied but that the General

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Assembly can confer upon courts of probate the power to grant new trials. This power is reserved to them. *Calder v. Bull*, supra; *Burch v. Newbury*, 10 N. York, 395. Is it any greater exercise of power to grant the new trial directly?

3. Although the act is in its nature judicial, yet the legislature of Connecticut has always exercised the right to enact such laws. *Calder v. Bull*, supra; *S. C.*, 3 Dall., 386; *Burch v. Newbury*, supra. And in this respect it differs from those of other states. Opening commissions, validating appeals, allowing probate of wills, and granting administration, are acts judicial in their nature, but the right of our legislature to allow them has never been denied. The legislature has the same unlimited power in regard to legislation that the British parliament holds, unless restrained by the constitution. *Cooley's Const. Lim.*, 88. Up to 1801 the legislature exercised judicial as well as legislative powers, and also after the adoption of the constitution when not limited by it. *De Mill v. Lockwood*, 3 Blatch., 56. It will not be denied that the legislature could enact a general law granting new trials in such cases; then why not a special law? Art. 5, sec. 1, of our constitution, provides that "the judicial powers of the state shall be vested in a Supreme Court of Errors, a Superior Court, and such other courts as the General Assembly shall from time to time ordain and establish; the powers and jurisdiction of which courts shall be defined by law;" thus expressly reserving to the legislature the power to define their powers and jurisdiction. The constitutions of Massachusetts, Maine and New Hampshire do not reserve this power to the legislature. The conclusion then is, that the law of other states, and especially as laid down in *Lewis v. Webb*, 3 Greenl., 326, *Holden v. James*, 11 Mass., 396, and *Merrill v. Sherburne*, 1 Adams, 199, is not authority, and should have little weight with this court. The question must be determined by the principles laid down by this court in former cases, and by the usages and customs of the General Assembly.

4. It is to be presumed that the General Assembly had good reason for enacting the law in question. *Booth v. Woodbury*, 32 Conn., 118; *Goshen v. Stonington*, supra. This

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court will not declare an act of the legislature unconstitutional unless it is clearly so. "It is a well settled principle of judicial construction, that before an act of the legislature ought to be declared unconstitutional its repugnance to the provisions of the constitution should be manifest and free from all reasonable doubt." *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn., 227.

G. H. Watrous and W. B. Stoddard, for appellee.

1. We contend that this appeal should abate and be dismissed, because it was taken to the Superior Court at its September term, 1877, instead of on the first Tuesday of May or June, 1877. The act of 1876, as amended by that of 1877, is as follows: "All process in civil actions, including appeals from probate, and all appeals which may be taken to the Superior Court in the counties of Hartford, New Haven and Fairfield, may be made returnable, in addition to the first days of the respective civil terms in said counties, on the first Tuesday of any month, except July and August; provided that the return day be not more than fifteen weeks from the date of process, and that service be completed at least twelve days, inclusive, before such return day." This appeal being taken on the 12th day of April, 1877, and made returnable on the second Tuesday of September, 1877, was not returnable fifteen weeks from its date, but more than twenty-one weeks thereafter. All process and appeals should be brought to the first possible court which has jurisdiction of the cause, and if a term or return day intervenes, it is cause of abatement. 1 Swift Dig., 594; *Olmsted v. Hoyt*, 4 Day, 436. Especially should all appeals from probate be so returned. The legislature makes them privileged cases.

2. The special act of 1877 authorizing this appeal to be taken after the twenty-one days allowed by the general statute for appeals from probate, is void and confers no powers or rights on this appellant. The general statute regulating such appeals, being the law of the land, and being in force at the time this appeal was taken, the legislature had no power to grant a privilege to this plaintiff that was denied to other

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citizens of the state similarly situated. *Cooley's Const. Lim.*, 392; *Lewis v. Webb*, 3 Greenl., 326; *Durham v. Lewistown*, 4 id., 140; *Holden v. James*, 11 Mass., 396; *Picquot, Appellant*, 5 Pick., 64; *Wally's heirs v. Kennedy*, 2 Yerg., 554. At the time this special act was passed, and when the attempted appeal was taken, the defendant had vested rights under the decision of the commissioners—the right to receive a proportionate part of the assets of the estate in payment of her claim. *Bailey v. Bussing*, 37 Conn., 352. The effect of this act, if valid, is not only to deprive us of vested rights, but is a judicial act by the legislature, granting the plaintiff a new trial of his cause, which is in violation of the 5th article of the constitution of the state. *Staniford v. Barry*, 1 Aik., 314; *Bradford v. Brooks*, 2 id., 284; *Hill v. Sunderland*, 3 Verm., 507; *Lewis v. Webb*, 3 Greenl., 326; *Merrill v. Sherburne*, 1 N. Hamp., 199; *Chastellux v. Fairchild*, 15 Penn. S. R., 18; *Bagg's Appeal*, 48 id., 512; *Taylor v. Place*, 4 R. Isl., 324; *Young v. State Bank*, 4 Ind., 301; *Burch v. Newbury*, 10 N. York, 375; *Albertson v. Landon*, 42 Conn., 209.

LOOMIS, J. The commissioners on the estate of George B. Wheeler deceased, allowed a claim in favor of the respondent, amounting to thirteen thousand nine hundred and eight dollars, and made and filed their report in due form in the probate court on the first day of February, 1877, and no appeal was taken from the doings of the commissioners within the twenty-one days limited by the law then existing.

But the legislature, upon the petition of the appellant and a hearing of the case, by joint resolution approved March 22d, 1877, passed the following special act:—

“General Assembly, January Session, 1877; Concerning Estate of George B. Wheeler:—

“Resolved by this Assembly that appeals may be taken from the doings of the commissioners upon the estate of George B. Wheeler, late of Milford, deceased, at any time within twenty-one days from the rising of the General Assembly.”

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Pursuant to the above act the court of probate, on the twelfth day of April, 1877, allowed an appeal in favor of the appellant, an heir-at-law of the deceased, to the Superior Court holden at New Haven on the second Tuesday of September, 1877, which was the next term of the court. There was then in session, however, a term of the Superior Court, which commenced on the first Tuesday in January previous, and which by law was to continue until the Friday preceding the first Tuesday of June following.

The appellee appeared in the Superior Court and filed her plea in abatement, based on two distinct grounds:—1st. Because the appeal was taken to the September term of the Superior Court, to be held more than fifteen weeks from the date of the appeal, when it should have been taken to the Superior Court then in session, on either the first Tuesday of May or the first Tuesday of June next following. 2d. Because the appeal was not taken within twenty-one days after the commissioners' report was filed in the probate court.

To the first ground the appellant demurs, and to the second makes a special replication justifying under the above special act of the legislature, to which replication the appellee demurs.

The questions arising on these pleadings are two: 1st. Was the appeal taken to the proper court? and 2d. Was the law authorizing the appeal valid? And these questions are reserved for the advice of this court.

The answer to the first question depends on the construction of the statutes regulating appeals from probate. The precise question is, whether the provision of the General Statutes, Revision of 1875, p. 390, sec. 15, allowing an appeal to the next term of the Superior Court, was in force at the time in question, or whether it had been repealed by an act passed in 1876, (Session Laws 1876, p. 100, sec. 3,) and by certain acts passed in 1877 (Session Laws, 1877, pages 182 and 202).

When the terms of the courts were re-organized in 1876, the first of these statutes then passed as applicable to three counties, of which New Haven was one, provided for a return

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of civil process to the first Tuesday of any month, except July and August, "in addition to the first days of the respective civil terms," with a proviso that the return day be not more than eleven (afterwards altered to fifteen) weeks from the date of the process. By one of the statutes passed in 1877, it was enacted that the words "all process," etc., in the first line of section three in the act of 1876, be held to include appeals from probate; and by the other it was provided that all appeals in the three counties mentioned might be taken to the first Tuesday of every month.

We think the phrase, "in addition to the first days of the respective civil terms," contained in the act of 1876, can only have effect by retaining the privilege conferred by the former law. These words clearly confer an additional privilege, and they fairly reserve the right, at the option of the party, to take his appeal either to the first Tuesday of every month, (except July and August,) or to the regular civil term. Both laws therefore may well stand together.

Having shown that the appeal was taken to the proper court, we come to the second question, which is the important one in the case—Was the special act of the legislature authorizing the appeal valid?

At the outset we must concede that if the act in question should be tested by the decisions of the courts of the other New England states, and the states of New York and Pennsylvania, cited by the counsel for the appellee, it must be declared void. And such a weight of legal authority we should at once accept as conclusive, were it not obvious, from the past history of our own jurisprudence and long continued legislative practice, that we have reserved a much larger field for legislative action than has ever been recognized in the states referred to.

Our divergence in this respect from the jurisprudence of our sister states may be owing in part to the more explicit language restricting the powers of the legislature in the constitutions of many of the states where the leading decisions are found, (to which we will hereafter refer,) and in part, perhaps principally, to the very extensive powers which were

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originally conferred on the General Assembly by the charter of Connecticut, and the great confidence which the people of this state always reposed in the wisdom of their "General Court," and to which they have so long been accustomed to resort for the redress of so many grievances.

Among other provisions in the charter we find that the General Court were authorized "to erect and make such judicatories, for the hearing and determining of all actions, causes, matters and things happening within the said Colony or plantation, and which shall be in dispute and depending there, as they shall think fit and convenient, and also from time to time to make, ordain and establish all manner of wholesome and reasonable laws, statutes, ordinances, directions and instructions, not contrary to the laws of this realm of England;" * * * "and for the imposition of lawful fines, mulcts, imprisonments, or other punishments upon offenders and delinquents, according to the course of other corporations within this our kingdom of England, and the same laws, fines, mulcts, and executions to alter, change, revoke, annul, release, or pardon, under their common seal, as by the said General Assembly, or the major part of them, shall be thought fit, and for *the directing, ruling and disposing of all other matters and things* whereby our said people, inhabitants there, may be so religiously, peaceably and civilly governed, as their good life and orderly conversation may win and invite the natives of the country to the knowledge and obedience of the only true God, and the Saviour of mankind and the Christian faith; which, in our royal intention, and the adventurers' free profession, is the only and principal end of this plantation." Colonial Records of Connecticut, Vol. 2d, p. 8.

Under the authority of this charter our General Assembly exercised executive and judicial, as well as legislative functions, from the earliest times. *Proprietors of White School House v. Post*, 81 Conn., 257.

Our colonial records show that one very large branch of legislative business was the hearing and granting of new trials. Colonial Records, Vol. 10; 1 Swift Dig., 815; *Calder v. Bull*, 2 Root, 350; *Hamilton v. Hemsted*, 3 Day, 338.

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Upon the adoption of our constitution in 1818, which by article II divided the powers of government into three distinct departments, legislative, executive, and judicial, and confided each to a separate magistracy; and by article V vested the judicial power in certain courts, it was natural, and indeed quite logical, to hold that all judicial functions of the General Assembly were at an end; and this claim was made at an early day, but was not accepted by this court. *Starr v. Pease*, 8 Conn., 547; *Day v. Cutler*, 22 Conn., 625; *Woodbury v. Booth*, 32 Conn., 126.

Now the principles of construction which we apply to the provisions of our constitution are the same that obtain in all our sister states, namely, that the constitution is a limitation, not a grant, of power, and except as limited by express provisions, the legislature is unrestricted in power, and as omnipotent in a legal sense as the British Parliament.

If then an act of the state legislature is not against natural justice, or the national constitution, and it does not appear affirmatively and expressly that there is some provision in the constitution forbidding it, we must hold it to be *intra vires* and valid.

And another well settled principle is, that long continued legislative usage is of controlling weight upon the question of the constitutionality of an act. *People v. Dayton*, 55 N. York, 367; *People v. Leonard*, 5 Hun, 626; 1 Story on Const., § 408; *McCulloch v. Maryland*, 4 Wheat., 401; *Ogden v. Saunders*, 12 Wheat., 290.

A reference to the private acts of our legislature will show that it has always exercised without question many judicial or quasi-judicial powers, notwithstanding articles II and V of our constitution.

It has repeatedly granted divorces for causes not sufficient to justify them in the courts. See Private Acts of 1847, 1856, 1865, 1870, and 1874.

It has administered *cy pres* relief in matters of charitable and ordinary trusts. Private Acts of 1868, 1869, 1870, 1871, 1873 and 1875.

It has often admitted wills to probate after ten years, and

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granted administration after seven years, and distributed estates and confirmed defective titles; and has repeatedly decreed the sales of lands left by will, so that they could not be alienated, one instance of which was approved by this court in *Linsley v. Hubbard*, 44 Conn., 109.

It has authorized a court of probate, upon application of any person interested, and proof that the interests of the estate require it, to appoint some person to continue the business of a co-partnership, dissolved by the death of the partner whose estate was pending before such probate court for settlement. Private Acts of 1865, p. 54.

It has released and discharged a person from a recognizance entered into by him as surety for another before a justice of the peace. Private Acts of 1876, p. 105.

And in one instance, at least, it annulled the judgment of a justice court. Private Acts of 1855, p. 168.

After certain appeals had been taken from certain city assessments to one judge of the court of common pleas, by name, to be heard by him simply as a judge and not as a court, it has authorized the same appeals to be heard and disposed of by another judge, his successor in office. Private Acts of 1875, p. 39.

By a public act passed in 1869, (Session Laws of that year, p. 341,) the legislature validated certain appeals from justices of the peace in Hartford, some having been taken to the City Court, and some to the Superior Court. It would seem that some of these appeals must have been originally void, as taken to the wrong court.

Assuming that this last act was valid, can there be any distinction between a public act, applicable to only one town, validating appeals not authorized at the time by existing laws, and a special act, applicable to one estate only, opening a further door for an appeal from the doings of commissioners, when existing laws did not authorize it?

We are not called upon now to decide that every act of our legislature referred to is valid. The foregoing references have been adduced to show, in a general way, the practical construction thus given to our constitution. And in view of

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past legislative usage, as evidenced by the foregoing instances and many others to be found in our private acts, we may say that our legislature has assumed, since the adoption of the constitution, to have a reserved power to grant relief, for good cause shown, in cases where there is no explicit prohibition in the constitution, and where under existing laws it is not in the power of any court to grant relief. There is now on our statute book (General Statutes, Revision of 1875, p. 79, sec. 3,) an act first passed in 1784, which provides that "no petition shall be preferred to the General Assembly for any relief which any court has power to grant." This by clear implication embodies the sense of successive legislatures for ninety-four years, that if no court has power to grant relief, and justice requires it, and the constitution does not forbid, application may be made to the legislature, even though it calls for the exercise of powers judicial in their nature.

Judge SWIFT, in his "System," Vol. 1, p. 75, printed in 1795, though he found fault with the General Assembly for too freely exercising judicial powers after the same had been vested in the courts, and complained particularly because it had exempted particular cases from the operation of the statute of limitations after it had become a bar, yet he approved of the above statute, and said its true meaning and construction was, "that where a new case happens, that has never been contemplated by a court of law or equity, so as to adopt a rule respecting denying or granting relief, then such omitted case may be the ground of an application to the legislature."

The decision in *Calder v. Bull*, 2 Root, 350, though made before the adoption of our constitution, well illustrates the rule that has in general governed our legislative action, after as well as before the adoption of the constitution. It was there held "that the power of granting new trials was ever exercised by the General Assembly, and when in 1780 they invested the power of granting new trials in the Superior and County Courts in cases which came before them, they reserved the power of granting new trials in all other courts;"

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and this case was affirmed in the Supreme Court of the United States in 3 Dallas, 386. The power which by our present statutes has been delegated to the courts in the matter of new trials, is still qualified by the same phrase as in 1780. The Superior Courts, Common Pleas, District Courts and City Courts, "may grant new trials of causes that may come before them." General Statutes, Revision of 1875, p. 447.

The probate courts are nowhere invested with this power, and all other courts are excluded from it by the limitation above mentioned. And as there is no express prohibition in the constitution, and articles II and V are not construed so as to exclude the exercise of all judicial functions, we conclude that, in causes before the probate court, there is still a reserved power in the General Assembly, for good cause shown, to authorize that court to allow an appeal from their doings with a view to a review of the case by the appellate court.

The principal objection on the part of the appellee to the validity of the act in question is, that it was in effect granting a new trial; our discussion therefore has been conducted mainly with reference to its bearing on this point.

It is true that two other objections were strongly urged, that it affects and impairs vested rights, and that it is an act of special legislation.

If however the legislature had power to grant a new trial, the argument that the right had vested is deprived of its force, because the right is not vested absolutely, but is subject to the contingency of further action by the legislature.

The same is true of the other objection, that the act was special in its character. In view of past legislative usage and the previous decisions of this court we are not prepared to accept for this state the legal proposition that special legislation is necessarily against natural justice and therefore void.

In the case of *Welch v. Wadsworth*, 30 Conn., 149, a suit had been brought on a note that was usurious, and by existing laws only the principal could be recovered. The case was defaulted, and after default and before hearing in dam-

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ages the legislature passed a special act, validating the contract in favor of one individual, to wit, the Hartford Savings Association, and the point was distinctly made that the act was void because it exempted one individual from the general law. But this court held the act valid notwithstanding.

We concede however that it is a very objectionable species of legislation, and if the last two objections had been urged before the legislature, very likely they ought to have prevailed. This court however does not presume to revise the action of the legislature, if *intra vires*, for as the case stands it is conclusively presumed that the legislature had good reason for enacting the law in question. *Goshen v. Stonington*, 4 Conn., 222; *Booth v. Woodbury*, 32 Conn., 118.

It is quite possible that there was in the case such mistake or surprise or fraud as that the plainest principles of justice would demand a remedy.

A case like this, tried before commissioners, differs from any ordinary suit at law, where one party, by writ and declaration setting forth his claims, brings his debtor into court, and both parties are present, or have direct notice to be present, and are thus advised of every step taken in the case, and of ulterior remedies in the event of an adverse decision. But here the appellee was not only the claimant to prosecute her claim before the commissioners, but administratrix also, to represent and defend the estate, and it is possible that the appellant, having no interest except as heir, may have been far away at the time of trial, or he may have had no reason to suppose that any such claim existed, or he may have been misled as to the time the report of the commissioners was to be filed.

We should have been better satisfied if some such strong equitable grounds for legislative interference had been disclosed of record; but it was not legally necessary; and as the presumption is that good cause existed, we have a right to test the validity and illustrate the necessity of legislative action in the light of the most favorable supposition.

We cannot say the act is against natural right and justice, unless led to such a result by the adoption of the arbitrary rule to which we have before referred.

The act at the most only affects the remedy, but not the debt, or any of the grounds on which it rests; it determines no right of the appellant, and affects injuriously no right of the appellee. And in these respects it may be distinguished from an act extending the period of the statute of limitations after it had already run against the claim; for in such case it is considered that no further legal obligation rests on the debtor, and he has a perfect defense in law, of which he should not be deprived without his consent. There are legal authorities of great weight which declare such an act invalid; but how it would be regarded in this state we have no occasion now to decide.

Our attention has recently been called to the case of *Mayor & Council of Hagerstown v. Schuer*, 37 Maryland, 180, where the court thought "it was not clear that it was not within the scope of legislative power to pass an act that might have the effect to revive as between individuals a cause of action completely barred by limitation before its passage."

In regard to the decisions of the courts of other states that are adverse to our view of the present case, we have previously intimated that many of them were rendered in view of special constitutional provisions much more explicit than our own in limiting legislative action. For example, the constitution of Massachusetts, adopted in 1780, expressly provides in article 30, that:—"In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them. The executive shall never exercise the legislative and judicial powers or either of them. The judicial shall never exercise the legislative and executive powers or either of them; to the end it may be a government of laws and not of men." And the constitution of Maine, adopted in 1820, provides (Art. III., sec. 2,) that:—"No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases herein expressly directed or permitted." And to the same effect are the constitutions of Vermont, adopted in 1793, (part 2, sec. 6); of Ohio, adopted in 1851, (Art. 2, sec. 32); of New

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Jersey, adopted in 1844, (Art. 3, sec. 1); of Indiana, adopted in 1851, (Art. 3, sec. 1); and of Tennessee, adopted in 1839, (Art. 2, sec. 2). The same also is true of many other states.

In the constitution of New Hampshire, adopted in 1792, (Part 1, Art. 23), it is provided that: "Retrospective laws are highly injurious, oppressive and unjust. No such laws therefore shall be made, either for the decision of civil causes, or the punishment of offenses." And article 37 provides that:—"In the government of this state the three essential powers thereof, to wit, the executive, the legislative, and judicial, ought to be kept as separate from and independent of each other as the nature of free government will admit."

If such explicit provisions were in our state constitution we might perhaps be led to the same result that has been reached in other states.

It is also to be observed that article V. of our constitution, after vesting judicial power in certain courts, adds:—"the powers and jurisdiction of which courts shall be defined by law." This clause is omitted in the states referred to, and may be of some significance on the question of the reserved powers of the legislature.

So far we have conducted the discussion without calling to our aid any decisions of other states. There are however several decisions in Maryland and one in Iowa directly in point.

In *Calvert v. Williams*, 10 Maryland, 478, a special act of the legislature was held constitutional and valid which authorized a court of equity, upon the application or petition of the defendant in a certain cause and upon the establishment of a satisfactory *prima facie* case, to open any decree which had been passed against him in said cause, "to the end that he may account fully, fairly and equitably for the estate," which had been under his management, and for a settlement of which the suit was brought, "provided the said court shall be satisfied that justice will be promoted by opening such decree or order, and provided it be opened upon such terms" as to cost, the nature of the defences to be relied on, the taking of

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testimony, &c., "as to the court may seem consistent with equity it being the design of this act to remove any legal impediment to the granting of such application and to afford the defendant such redress upon the principles of justice and equity as he may show himself entitled to, when relieved from the operation of any technical or rigid rule of law."

This seems to cover the entire ground of the case at bar. After a legal judgment in a suit pending in court, the legislature authorized the court to reopen the case and give the defendant a new trial; it also authorized the stay of execution until the new hearing should be had, and after the hearing a still further right of appeal. The accompanying statement of reasons, purposes and conditions, has no bearing on the question of the power of the legislature to pass such an act. These things show a careful and prudent exercise of the power which they possessed. The love of equity and the sense of justice which the legislature of Maryland expressed, may all be presumed in favor of our own legislature.

In *Johnson v. Semple*, 31 Iowa, 49, after a trial and judgment for the plaintiff, and no motion for new trial made and no such privilege existed, the legislature passed an act dispensing with motions for new trials, and so, in effect, extended the privilege to cases where it did not before exist. The act was held to be constitutional, because it affected only the remedy. Judge Cole however, while fully sustaining the validity of the act, intimated his opinion of its propriety, by adopting the suggestion of the opposing counsel, who said the act should have been entitled, "an act for the relief and benefit of lazy and careless lawyers."

For the foregoing reasons we affirm both the validity of the appeal and the act authorizing it, and advise that the first ground of the appellee's plea in abatement is insufficient, and that the replication to the second ground of the plea is sufficient.

In this opinion the other judges concurred; except CARPENTER, J., who did not sit.

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HENRY T. BLAKE *vs.* THOMAS L. WATSON AND ANOTHER.

A statement in an advertisement of railroad bonds for sale, that "the road is in successful operation and earning net more than the interest on all its bonds"—held to be a representation, not that the road was earning that amount at the exact date of the advertisement or during the time it might appear in the newspaper, but that the road was then on a paying basis and was steadily earning net more than the interest on all its bonds.

ASSUMPSIT upon a warranty of certain railroad bonds sold by the defendants to the plaintiff; brought to the Superior Court. The facts were found by a committee, and judgment rendered by the court (*Hovey, J.*) for the plaintiff. Motion in error by the defendants. The case is fully stated in the opinion.

E. W. Seymour, with whom was *I. M. Bullock*, for the plaintiffs in error.

H. B. Harrison, for the defendant in error.

LOOMIS, J. This is an action for a breach of warranty contained in an advertisement for the sale of the second mortgage eight per cent. convertible bonds of the Indianapolis, Bloomington & Western Railway Company, published in the Bridgeport Standard, a daily newspaper, and continued in the daily issue of that paper from the 7th day of March, 1872, to the 27th day of April of the same year. The plaintiff noticed the advertisement soon after it appeared, and believing the representations therein made, and relying upon them as true, called upon the defendants, who were responsible for the advertisement, and purchased of them, on the 12th and 18th days respectively of March, 1872, the bonds mentioned in the declaration.

The advertisement, among other things, contained the statement that the railway referred to "is in successful operation, and earning net more than the interest on all its bonds," and the plaintiff's action is for a breach of this particular warranty.

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The facts were found by a committee and the court rendered judgment for the plaintiff, which the defendants claim was erroneous, because the finding of the facts upon which the judgment was based shows no breach of the warranty.

In order to uphold the judgment, it must appear that the railway referred to, at the time of the warranty, to wit, on the 12th and 18th days of March, 1872, was not earning net more than the interest on all its bonds, within the meaning of the warranty.

The finding of the court expressly affirms this proposition in the very language of the issue, as follows:—"The committee find, however, upon the facts as above stated, the branches of the warranties are alleged in said last four counts of the plaintiff's declaration, to wit, that at the time the warranties were made in said sales of the 12th and 18th of March, 1872, the said road was not earning net more than the interest on all its bonds, and thereby was not in successful operation."

This would seem to be conclusive of the fact against the defendants, unless indeed the facts referred to are so inconsistent with the latter finding that it cannot stand, or unless the committee were led to the result by an erroneous construction of the contract of warranty.

None of the facts referred to are claimed to be inconsistent with the finding of the issue as above mentioned, except the fact that, in the months of March and April, 1872, the road did in fact earn a little more than the proportionate part of the interest on the bonds. This was an item of evidence in favor of the defendants to be considered, but it is not conclusive, even upon the defendants' construction of the warranty; for it merely shows that at the end of the month of March the road had earned more than one month's proportion of the interest, but it nowhere appears that up to the 12th and 18th days of that month, or for the month just prior to these dates, the road had earned more than the interest on the bonds; and considering the large deficiency at the end of the month of February next preceding, and the very small excess of earnings over the interest, (being only about \$235,) at the

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end of March, the probability would be that up to the 12th of March, or even the 18th of March, there would be no excess of earnings over the interest. It is further found that from October, 1870, down to the month of March, 1872, there was no single month in which the net earnings equaled a month's proportion of the interest; and there was no period of six months in the history of the road, so far as traced, when the road earned net more than the interest on its bonds.

It is not our province to revise the finding of the committee or the court upon matters of fact, and we have only referred to the facts to show that there is nothing necessarily inconsistent with the literal truth of the above mentioned finding of the breach of warranty, adopting even the construction of the contract claimed by the defendants. And this brings us to the only question of law raised in the court below. The defendants claim in substance that the finding of a breach of the warranty by the committee was the logical result of a misconstruction of the contract, and a consequent misapplication of the evidence. The record shows the respective claims of the parties on this point as follows: "The plaintiff claimed that, it being proved, as the committee has found, that the railroad company had never in any six months since it commenced operating the road, until and including the month of February, 1872, earned net more than the interest on all its bonds, a breach of the warranties in that particular was established; and denied the defendants' claim, on the other hand, that to show such breach of warranties the plaintiff must prove that at the very dates of the warranties the road was not earning net more than the interest on all its bonds, however it might be that until then such earnings may have been insufficient for such interest."

Ought the defendants' construction of the contract to have prevailed? We think not. A reasonable and common-sense construction should be given to such a warranty.

The object was to induce persons who might read the statement to invest their money in the interest-bearing bonds of the railroad company, by inducing a firm belief that the interest could and would be paid when due.

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The warranty covered, and was intended to cover, the condition and ability of the road to earn money. To confine the statement to the very day or week or even month of the warranty, seems to us absurd. If it had appeared with an express limitation of that character it would have surely repelled instead of attracting purchasers.

It is quite obvious that there must be exceptional days and weeks, and even months, when the earnings of a railroad, from special and transient causes, will be carried far above the average. When therefore the advertisement stated that the road "is in successful operation and earning net more than the interest on all its bonds," it could not be taken to refer to exceptionally large earnings at the very date of the advertisement, nor to the time it might appear in the newspaper; but that the road was then on a paying foundation—that it was regularly, habitually, earning net more than the interest on all its bonds.

The legal issue was of course whether on the very day of the purchase of these bonds the statement which induced the purchase was true or false, but the evidence bearing on the issue would properly take a wider range to show the regular and reliable earnings of the road; and such a course is very common in actions for the breach of contracts of warranty; the condition of the thing warranted, both before and after the precise date of the warranty, tends to show its condition at the time.

As the interest on these bonds was payable every six months, the plaintiff quite naturally claimed that, as the railroad company had never in any six months since it commenced operating the road, until and including the month of February, 1872, earned net more than the interest on all its bonds, a breach of warranty was thereby established.

This was very strong evidence tending to show a breach of warranty, but upon the construction of the contract we have indicated it would not necessarily be conclusive in law; for these facts might be true and yet it might also appear that during the same time the financial condition and earnings of the road had been gradually improving, until at the

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time of the warranty it was on a permanent paying foundation. In such case, notwithstanding the previous history of the road, the warranty might have been made good. But if this was the case, the after-history of the road would become all important.

In the case at bar, however, no such permanent condition as to earnings was ever reached, and the only fact in the after-history of the company which is disclosed by the finding, shows that it became insolvent, and in December, 1874, went into the hands of a receiver.

There was no error in the judgment complained of.

In this opinion the other judges concurred; except CARPENTER, J., who did not sit.

LUCIUS N. BEARDSLEY, ADMINISTRATOR, *vs.* THE AMERICAN HOME MISSIONARY SOCIETY AND OTHERS.

A bequest to the "Home Mission Society" construed as a bequest to the "American Home Missionary Society," upon proof of facts, outside of the will, showing that that society must have been the one intended, and there being no society of the former name.

PETITION to the Superior Court for advice as to the construction of the will of Catherine P. Beard, the petitioner being administrator of her estate with the will annexed. The respondents were the American Home Missionary Society and the heirs at law of the testatrix. The following facts were found by a committee:

Catherine P. Beard, the testatrix, died on the 7th day of April, 1863, at Milford in this state, where she had resided, leaving the will in question, which was executed on the 22d day of May, 1860. By it she disposed of all her property in the following clause:

"To the Home Mission Society I give, devise and bequeath wli my estate, both real and personal, and request that it may

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all be used for the benefit of those located west of the Mississippi."

There was in fact no missionary society named the "Home Mission Society;" but there were the Home Missionary Society, located in the city of New York, and which employed missionaries in several states and territories west of the Mississippi river; an incorporation of this state named the Trustees of the Missionary Society of Connecticut, commonly known as the Missionary Society of Connecticut, which was carrying on missionary operations to some extent west of the Mississippi, but which had for some time ceased to solicit contributions from the public, deriving the funds needed for its work from the income of certain investments; and also certain societies auxiliary to the American Home Missionary Society, named the "Massachusetts Home Missionary Society," the "Rhode Island Home Missionary Society," and the "Connecticut Home Missionary Society," whose operations were mainly confined to their own states.

The American Home Missionary Society was often called the Home Mission Society or Home Missionary Society, was sustained almost wholly by churches and Christians of the Congregational order, and was in the habit of soliciting contributions among the Congregationalists of the town of Milford and in the First Congregational Church of that place, at which the testatrix was a regular attendant, and at which, by the manual of the church, it was one of the charitable institutions for which church contributions were regularly taken. The testatrix for several years before the execution of the will had contributed regularly to the support of this society and continued to do so afterwards.

If upon these facts the committee was warranted in finding that the testatrix intended, by the clause in question, the American Home Missionary Society, then the committee found that to be her intention.

The case was reserved, upon the report of the committee, for the advice of this court.

H. B. Harrison, for the American Home Missionary Society.

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S. E. Baldwin and J. H. Whiting, for the heirs at law.

PARK, C. J. We think this case comes within the principle established by this court in the case of *Dunham v. Averill*, ante, page 61. In that case a bequest was made in these words: "To the American and Foreign Missionary Society," &c. There was no society or corporation by that name, but there was a corporation by the name of the "American Board of Commissioners for Foreign Missions." It was held by this court that evidence *dehors* the will was admissible to show that the testator intended this corporation when he said in his will "The American and Foreign Missionary Society." In the case at bar the committee has found as a fact from similar evidence, which was held admissible in the case referred to, that the testatrix intended the "American Home Missionary Society" as the object of her bounty, when she said in her will "The Home Mission Society."

We advise the Superior Court that the American Home Missionary Society is entitled to the legacy.

In this opinion the other judges concurred; except CARPENTER, J., who did not sit.

HIRAM E. WELTON vs. THE TOWN OF WOLCOTT.

The statute (Gen. Statutes, tit. 15, ch. 2, part 1, sec. 5.) provides that "when a person not an inhabitant shall become poor and unable to support himself, the selectmen of the town shall furnish him with necessary support as soon as his condition shall come to their knowledge." Held not necessary that the selectmen should act as a body, or upon consultation, in such a case, but that any one of them was empowered to furnish the relief needed.

And held therefore that a town was liable for necessities furnished to such a person upon the request of one of the selectmen.

WRIT OF ERROR to reverse a judgment of the Court of Common Pleas in New Haven County in favor of the defendants in an action of assumpsit for supplies furnished to a
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pauper; the case having been tried below on the general issue, closed to the court, before *Peck, J.*, who made a finding of the facts. The case is sufficiently stated in the opinion.

W. Cothren, for the plaintiff.

J. O'Neill, for the defendants.

PARDEE, J. William Brown, a pauper having his settlement in the town of Morris, was temporarily in the town of Wolcott, and in want. Of these facts the plaintiff gave notice to one of the selectmen of Wolcott, who said to him that if he would furnish necessaries to the pauper the town would pay him therefor; whereupon he furnished them. Payment not being made he brought his action to the Court of Common Pleas, which decided that the town was not liable.

The statute (Revision of 1875, p. 199, sec. 5,) provides that "when a person not an inhabitant of the town in which he resides shall become poor and unable to support himself, the selectmen of such town shall furnish him with necessary support as soon as his condition shall come to their knowledge; and each selectman neglecting such duty shall forfeit seven dollars to him who shall sue for the same."

This statute, framed in the interest of humanity, is intended to make the provision for the poor so complete that if a man is overtaken by want when he is absent from home, and the fact comes to the knowledge of any of the selectmen of the town in which he happens to be, there instantly springs up the duty to give him food if he is hungry or medicine if he is sick. In this particular matter this section of the statute does not intend to give time for investigation as to where his legal settlement may be, before action; nor does it allow of the operation of that rule of law which determines that when power is given to two or more selectmen for public purposes, and especially for purposes of a judicial character, it shall, when all have been legally notified, be executed by a majority, and not by one of them. This necessary assistance is not a matter of discretion and is not to depend upon the result of a consultation; the mandate seems to be to each

selectman; and it requires action as soon as there is knowledge. The intent to furnish immediate relief is the marked characteristic of the section; and we should nullify its whole purpose if we determined that it imposes no duty upon and requires no action from one until notice has been given to all.

We think that the one selectman who was notified could without conference with his associates have used the public money for the immediate relief of the person in want; could have fed him at his own house and charged the town with the expense; could have furnished the food at the house of another; or could ask that other to furnish the food and could bind the town to pay for it.

In view of the nature of the relief and of the circumstances under which it is to be granted, we think that this section of the statute makes the town of Wolcott responsible for the promise made in this case by one of its selectmen.

We advise the Court of Common Pleas that there is error in the judgment complained of, and that judgment should be rendered for the plaintiff for the sum of \$150 and his costs.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *vs.* THE NEW HAVEN & NORTHAMPTON
COMPANY.

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The charter of a railroad company provided that if the road in its location should intersect any highway, the company should restore it to its former state in such a manner as not to impair its usefulness; and that the railroad should be so located within the town of *H* that in its construction and use it should not interfere with a certain turnpike road so as to obstruct, impede or endanger public travel. The location of the road was to be approved by the railroad commissioners, and a special committee appointed by the Superior Court was to determine whether the company had complied with the requirements of its charter as to the turnpike road. The road was located for two miles in the town of *H* close beside the turnpike, the traveled path of which was in some places changed to make room for the road. The commissioners approved the location, and the committee reported that the company had com-

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plied with the requirements of its charter. Thirty years afterwards, when the turnpike had become a town highway, the increase of travel upon the highway, and of the number and speed of the trains on the railroad, had rendered the proximity of the railroad to the highway a much greater injury to the public than it was at first, and the Attorney for the State applied for a mandamus to compel the railroad company to change the location of its road and to restore the highway to its former usefulness. Held—

1. That the case was not one of the "intersecting" of a highway by the railroad, that term applying only to the case of a railroad crossing a highway.
2. That the provisions of the charter were not intended to impose upon the railroad company the duty of removing all danger incident to the operation of the railroad.
3. That the duty imposed upon the company was not a continuing duty.
4. That the action of the railroad commissioners and of the special committee was final as to the propriety of the original location of the road and as to the compliance of the company with the requirements of its charter in respect to the turnpike road.
5. That no further legal duty was imposed upon the company by reason of the increased danger from the increase of travel on the highway and of the number and speed of the trains.
6. That it did not affect the case that the commissioners and committee had dealt with the questions to be determined by them as questions of property rights, giving notice only to the turnpike company and property owners, and none to the public. The legislature intended by their action to protect the interests of the public, and if they were not sufficiently secured it was a matter for the legislature and not for the courts.

The writ of mandamus is designed to enforce a plain positive duty, upon the relation of one who has a clear right to have it performed, and where there is no other adequate legal remedy.

APPLICATION for a mandamus; brought to the Superior Court, to compel the defendants, a railroad company, to restore to its former state, or in sufficient manner not to impair its usefulness, a portion of the highway in the town of Hamden, known as the Cheshire Turnpike, and which was interfered with by the location of the defendants' railroad, and to re-locate their road in such a way as not to interfere with the highway or obstruct or endanger travel thereon.

The application alleged that the defendants were required by their charter to make and keep up such a restoration of the highway and that they had disregarded their duty in this respect, and that by reason of the location of the railroad for a long distance in close proximity to the traveled path of the highway, and of the greater number and speed of the trains now run upon the road, the public travel was greatly obstructed

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and endangered. The answer of the defendants averred that the road was legally located and constructed in its present place in the year 1847, and had ever since been legally operated where so located and constructed; and that all the requirements of the charter and of the general laws of the state in reference to the matter had been fully complied with, and especially that the location of the railroad and restoration of the highway had been approved by the commissioners of the road and a special committee appointed by the Superior Court for the purpose, whose judgment in the matter was final.

The court made a finding of the facts and reserved the case for the advice of this court.

The facts of the case are more fully stated in the opinion.

T. E. Doolittle and W. L. Bennett, for the State.

First. This application is brought in behalf of the public. The estoppel must be proved against the public. The application alleges, 1st, that the respondents have wrongfully so located their railroad that in its construction and use it has always interfered with the turnpike road of the Cheshire Turnpike Company, so as to obstruct and endanger the public travel thereon; and 2d, that where the railroad intersects said road the respondents have wholly failed to restore the same to its former state or in sufficient manner not to impair its usefulness. It is claimed by the respondents that the approval of the location of the railroad by the commissioners appointed by the legislature, and the certificate of the committee appointed by Judge Storrs, preclude the court from inquiring into these allegations. We reply—

1. The approval of the commissioners appointed by the legislature does not affect the case. In the first place, whatever its effect, as the road at that time was but a line described upon paper by a surveyor, it is apparent that this approval can have no bearing upon questions as to restorations made afterwards by the respondents in the construction of their road, upon intersected highways. This approval was not final even as to the location of the road upon the Cheshire

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turnpike. In the third section of the charter provision is made only for notice to land owners, and they alone could be, and were in fact, notified and heard by the commissioners. The Cheshire Turnpike Company was not notified. It was not an owner of land upon the line of the road; but it held a valuable franchise, and its road was a matter of public necessity, and on this account it was entitled to be heard as to the location of the railroad. There was no opportunity for the public to be heard. The land-owners were notified and heard; but the larger portion of the public which used the turnpike-road, but owned no land upon the line of the railroad, were not notified or heard.

2. Section sixth of the charter of the respondents provides, 1st, for the restoration of highways intersected by the railroad, and 2d, for the location of the road in regard to the turnpike road of the Cheshire Turnpike Company. And at the end of the section a tribunal is created in the following words: "And said corporation may apply to any judge of the Superior Court, who may by law judge between the parties, who, after notice given, may appoint three disinterested persons to determine whether said corporation has complied with the provisions aforesaid; and if approved by them, their decision shall be final." Now it is an open question whether under this section of the charter a decision by a committee appointed by a judge of the Superior Court could bind the public. But however that may be, the proceedings which were actually had are binding between the turnpike company and the respondents only. The question that the committee was created to answer was, whether the railroad was so located that it would not interfere with the turnpike road. The turnpike company was the only party notified to be heard as to the appointment of the committee, and the only one heard before the committee. It was a matter entirely between the two corporations. The turnpike company had its stockholders to protect, for the railroad, if located near it, might reduce the amount of tolls. If it was the duty of the turnpike company to protect the interest of the public, it is manifest that in regarding its own interest it wholly neglected this

duty. It acted towards the railroad corporation as if its own pecuniary interests were alone at stake, and having arranged to receive the sum of \$2,000 for the right of way and damage, allowed the respondents to do as they pleased. The respondents were really both plaintiffs and defendants before the committee. What the respondents did was of no concern to the turnpike company, so long as that company lost no money. But, however convenient and satisfactory this arrangement was to the two corporations, the rights of the public were in no way regarded. The public had a right to travel over the whole of the highway, and by the provisions of the 6th section of the charter the legislature evidently intended to guard against any infringement of this right, and to insure the safety of the traveling public; and now the very means adopted by the legislature for that purpose are sought to be used by the respondents through a fraudulent agreement with another corporation, to defeat the intention of the legislature. It is evident from the charter itself, that the legislature never contemplated that the railroad should be located upon the highway, but so far from it as not to interfere with the safety of the traveling public. The public have always used the highway. Before the turnpike was constructed it was the main street of Hamden. It is difficult to see why the public should suffer inconvenience and danger without remedy, because the turnpike company for a consideration saw fit to allow the respondents to build their road in the highway.

3. The certificate of the committee appointed by Judge Storrs does not decide whether the respondents have ever complied with the provisions contained in section 6th of their charter, concerning the restoration of highways intersected by the railroad. The proceedings upon their face show that they were brought only to decide the question of the location of the road between the two corporations, and there is nothing in the papers tending to show that the committee passed upon the restoration of the highway. At the time the certificate was given the road was in course of construction. It was not completed until 1848.

4. If it had been expressly decided in 1847 that the rail-

road company had restored the turnpike to its former state or in sufficient manner not to impair its usefulness, such decision would not bar us from inquiring whether now they kept the highway in repair. This section of the charter has been repeatedly construed by this court to require, not a single act of restoration, but a new and additional act as often as public convenience or necessity might require. The duty of the corporation is a continuing duty. *Burritt v. City of New Haven*, 42 Conn., 174, 197; *English v. N. Haven & Northampton Co.*, 32 id., 240; *Cott v. Lewiston R. R. Co.*, 36 N. York, 214; *Chicago, Rock Island &c. R. R. Co. v. Moore*, 75 Ill., 524.

Second. Without the authority of the legislature the railroad company would have no right to interfere in any way with any highway. If the power is given them accompanied by conditions, the conditions must be strictly performed or the railroad will be a continuing nuisance. *Hamden v. N. Haven & Northampton Co.*, 27 Conn., 158; *Inhabitants of Springfield v. Conn. River R. R. Co.*, 4 Cush., 63; *Commonwealth v. Erie & North East R. R. Co.*, 27 Penn. S. R., 339; *Queen v. Scott*, 3 Queen's Bench, 543. The powers given them are to be strictly construed. *Commonwealth v. Erie & North East R. R. Co.*, 27 Penn. S. R., 339. The conditions upon complying with which the respondents may interfere with the highway in question, are, 1st, that they shall restore it to its former state or in sufficient manner not to impair its usefulness; 2d, that the railway shall be so located that in its construction and use it shall not interfere with the turnpike road so as to obstruct or endanger public travel. If a location was to be selected for the purpose of obstructing and endangering public travel, the present location of the road would be well chosen for the purpose. The center line of the railroad for more than a mile is within the limits of the highway. The surface width of the road bed, without counting the spread of the embankments, is twelve feet. The actual width of their road the respondents have never seen fit to fix. But they have placed in the center of the traveled track of the highway a substantial railing. Can it be supposed that

this location complies with the provision of the charter, which demands that it shall not in any way interfere with the turnpike? It actually takes the traveled track, diminishes the width of the way, and without regard to accidents, leaves the public, who must use the highway, to avoid the engines and cars as best they may, over the two miles or more of narrowed road. In the case of *Commonwealth v. Erie & North East R. R. Co.*, 27 Penn. S. R., 339, the railroad company built their road eighty rods along a country road, under an act which provided that the railroad should be so "constructed as not to impede or obstruct the free use of any public road now laid out, opened or built." The court held that they should remove their railroad wholly from the highway, saying, (p. 366:) "It is idle to talk of laying down a railway in the middle of a common country road, and running locomotives and cars over it constantly without impeding or obstructing the free use of it by the public. The commonest kind of common sense forbids us to believe such a thing at all possible." But the other condition imposed upon the respondents has still less been fulfilled. We have claimed that no tribunal has yet had before it the question whether the respondents restored this highway when intersected by the railroad; and moreover, that the duty to restore is a continuing duty, and that even if performed once, such performance will not debar us from enquiring whether now the highway is in its former state or in sufficient manner not to impair its usefulness. But the highway was not, when the road was completed, restored in sufficient manner not to impair its usefulness. After building their road upon the highway nothing was done to it by the respondents either to alter its course or to protect the public upon it. It remained the same country road without alteration, restoration or change, except that the railroad of the respondents was built upon it, and its usefulness was impaired. It is contrary to common sense to say that a portion of a highway can be taken, a railroad with wide spreading embankments built upon it, locomotives and cars run over it, and yet the highway be not impaired in usefulness. *People ex. rel. Green v. Dutchess & Columbia R. R. Co.*, 58 N.

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York, 152, 164. The whole of the highway should be restored and not the traveled track alone. *Judson v. N. York & N. Haven R. R. Co.*, 29 Conn., 434. An obstruction placed upon the unworked portion of the highway is a nuisance. *Commonwealth v. Boston & Lowell R. R. Co.*, 12 Cush., 254. At the present time the travel, both over the railroad and the highway, has greatly increased. The population has increased, and with it the travel, and the necessity of having a safe and unobstructed road. When the railroad was opened for use the trains were few; now they are many, and run at a higher rate of speed and at irregular hours. The railroad remains in the highway, as before, but it is so used that now, if not when it was made, it impairs the use of the highway. And within a few years the respondents have placed a fence directly in the center of the traveled track of the highway. Not only the portion of the highway taken before, but a greater portion, half even of its traveled track, is now occupied. We claim that under these facts common convenience and necessity demand now, if never before, that the respondents should restore this highway. A new and additional duty now rests upon the respondents created by a change of circumstances. *Burrett v. New Haven*, 42 Conn., 197.

J. S. Beach and *G. H. Watrous*, for the defendants.

1. Mandamus is a remedy at law available only when there is a clear legal right on the one side and a clear legal duty on the other, and when there is no other remedy. Chief Justice Waite, in *Ex parte Cutting*, (Am. Law Times, March, 1877, p. 36,) says: "The office of a mandamus is to compel the performance of a plain and positive duty. It is issued upon the application of one who has a clear right to demand such a performance, and who has no other adequate remedy." See also High's Ext. Remedies, §§ 7, 8, 9.

2. The defendants' railroad was legally located where it now is. The proviso in section 6th of their charter regarding the Cheshire turnpike was fully complied with. The turnpike company was legally notified of the application for the appointment of and hearing before the special committee,

and no other party was entitled to notice; no other party had any interest in the question to be submitted to the committee. This hearing was closed on the 25th of October, 1847. The location of the railroad in this place had been, as against the public and as against all private parties except the turnpike company, legally fixed on the 19th of November, 1846. The property of the turnpike company being a franchise, and extraordinary in character, the legislature granted to it a special tribunal to pass upon its rights as involved in the location of this railroad. This was the sole object of the proviso to the 6th section of the charter. The public and other private parties had, in connection with the location of the road, the same kind of tribunal and notice which, under the general statutes, are provided in all similar cases. If this proviso is for the benefit of any party besides the turnpike company, then it is for the benefit of all other parties; and the public, including everybody on the line of the location, was entitled to two hearings on the subject of the location of the road on the west side of this turnpike; one before the general commission, and one before the special commission. This would be absurd, and the legislature will not be presumed to have enacted an absurdity. The judgment of the special court, rendered on the 25th of October, 1847, was not obtained by fraud, and the receipt for \$2,000, dated December 28th, 1847, (the only evidence offered in support of that claim), does not even tend to show fraud in that judgment. That money was paid for so much of the right of way as was taken from the turnpike company. If it had been paid to extinguish the turnpike franchise, or buy up the control of the stock, there could have been no fraud, for no parties were interested but the parties to the transaction; all other parties were protected by the prior proceedings. The action of these two tribunals being authorized and legal was, and is, final; at least so far as the courts are concerned. *Waterbury v. Hartford, Prov. & Fishkill R. R. Co.*, 27 Conn., 146; *Chester v. Conn. Valley R. R. Co.*, 41 id., 348, 355. If these positions are well taken, then it follows that the court below erred in receiving testimony as to the location of the railroad.

3. The town of Hamden claims that, even if the location was originally legal, it has become illegal by reason of what has happened since the location was made. But the railroad company has done nothing since the location that it has not a right to do. Surely more and faster and extra trains cannot make the location of the railroad illegal, for when that location was made, and the railroad built, it was intended that there should be such increased use of the road if the public convenience should, as was expected to be the case, require it. The increase of population cannot, nor can the erection of a railing, make that location illegal. No other changes can be suggested.

4. If the location of the railroad ought to be changed it manifestly ought to be done by somebody having the legal power to do it. The railroad company has no such power. Its power of location was exhausted when its railroad was built on the original location. The railroad company has not even the legal power to cease to operate its railroad, and mandamus would lie to compel it to go on if it should attempt to stop. *State v. Hartford & N. Haven R. R. Co.*, 29 Conn., 538.

5. But it is claimed that, even if the road was legally located, and the highway legally "restored to its former condition so as not to impair its usefulness," yet it has not been kept restored. To this claim there are two answers, each of which is complete.—1st. This language has reference to the highway as a structure, and not to the railroad, and it is not the duty of the defendants to keep the highway restored. Its continued reparation remains, as it was before, the duty of the turnpike company, or of the town, as the case may be.—2d. If this duty of restoration includes the railroad as well as the highway, and if the law raises a duty to keep both restored, that does not require or permit any change by the railroad company in the location of either the railroad or the highway. The most that could be claimed, under this broad view, would be that both the railroad and the highway should be kept as and where they were when restored. This has been done, and there is no claim that they are not now so

kept. At least there has not been the slightest change in the condition or location of either, unless the erection of a railing as ordered by the railroad commissioners makes a change. But that railing must be presumed by this court to have been properly ordered and hence properly there. If otherwise, its presence there could not invalidate the location of the railroad or impair the restoration of the highway.

6. The real trouble with the people of Hamden is, that their horses when on the highway are sometimes scared by the trains passing on the railroad. But this matter is not an open one. So far as it is an evil growing out of the contiguity of the railroad and highway it is *res adjudicata*. The legislature never intended that the liability of animals to be frightened should defeat the location of a railroad, or that a highway should be deemed not restored, or not kept restored, because animals might be frightened at the sight of passing trains. *Bordentown &c. Turnpike Co. v. Camden & Amboy R. R. Co.*, 2 Harrison, 314; *Baltimore &c. Turnpike Co. v. Union R. R. Co.*, 35 Maryl., 224. There is not a railroad in the country that is legally located, nor a highway that is legally restored, if such was the intention of the legislature, for there is not a railroad in the country at sight of whose passing trains animals are not more or less frightened while on the highway. Whether the railroad intersects a highway, or passes alongside of, or even in sight of it, the effect on animals is the same. These are evils inseparable from having railroads, and yet the benefits are greater than all the incidental evils. If, however, the evil becomes great the legislature has provided a remedy which is entirely effectual and which does not destroy the railroad. Gen. Stat., p. 237, § 86. In this particular case the legislature in 1875 passed a law providing for the supposed danger in the precise locality to which these proceedings have reference. Special Laws, 1875, p. 185.

CARPENTER, J. Over thirty years ago the defendants were duly incorporated, and authorized to lay out and construct a railroad along or near the line of the Farmington Canal from

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New Haven northerly to the town of Farmington. The road was located in 1846. The location in the town of Hamden was very near a highway, then the Cheshire turnpike road, and now an ordinary town road, which location was approved by the board of commissioners appointed for that purpose by the General Assembly. The road was constructed as located, and has been in operation since 1848.

The State's Attorney for New Haven County now files an application for a mandamus.

After alleging the powers and duties of the railroad company in locating and constructing their railroad with reference to highways generally, and with reference to the Cheshire turnpike road in particular, he avers that said corporation in constructing their railroad through the town of Hamden located and constructed the same so that it intersects and crosses the road of the Cheshire Turnpike Company, and that portion of the same which had been constructed upon an ancient highway; and that it ran and still does run along and upon said highway for a distance of more than two miles; that said corporation did not then and have not since restored said road to its former state, or in sufficient manner not to impair its usefulness, but left the same and have ever since suffered and allowed the same to remain and become out of repair, in dangerous condition, and impaired in usefulness; that said corporation did not so locate their railway that in the construction, completion, use and occupation thereof, it should not in any way interfere with the said turnpike road, so as to obstruct, impede or endanger the safety of the public traveling thereon, but so located the same that in its construction, completion, use and occupation, it then was, ever since has been, and now is, an interference with the said road, so as to obstruct, impede, and endanger the safety of the public traveling thereon. The Attorney then prays for a mandamus commanding the defendants to restore said highway to its former state, or in sufficient manner not to impair its usefulness, and to keep the same in its former condition, or in such condition that its usefulness is not impaired; also "to so locate their said railroad that in the construction, completion, use

and occupation thereof, it shall not in any way interfere with said turnpike road, so as to obstruct, impede or endanger the safety of the public in traveling thereon. The defendants, in answer to said application, set up the proceedings in the location and construction of the railroad, the action of the railroad commissioners thereon, and the action of a special committee appointed by a judge of the Superior Court, according to the provisions of the charter, to determine whether the defendants had complied with their charter in regard to said turnpike road.

The Superior Court, after stating the formal and undisputed facts alleged in the application and answer, finds as follows:—"That the location of said railroad in relation to said turnpike between the termini aforesaid is now, at the time thereof was, and ever since has been, such that the use and occupation thereof by transporting persons and property thereon, by the power and force of steam, do expose persons traveling upon said turnpike to the danger of accident by their horses becoming frightened, and if, within the meaning of the defendants' charter, this makes said railroad obstruct, impede or endanger the safety of the public traveling on said highway, then I find that said railroad does obstruct, impede or endanger the safety of the public traveling on said highway; and if the foregoing facts, within the meaning of the defendants' charter, constitute a failure on the part of the defendants to restore said highway to its former state, or in a sufficient manner not to impair its usefulness, then I find that the defendants did fail to restore said highway to its former state, or in a sufficient manner not to impair its usefulness."

The case thus presented is reserved for the advice of this court.

The writ of mandamus is designed to enforce a plain positive duty, upon the relation of one who has a clear legal right to have it performed, and where there is no other adequate legal remedy.

The first question which presents itself for our consideration is, whether it is now the plain positive duty of these defendants to restore the highway to its former condition of usefulness; that is, to remove the danger incident to its use.

The solution of this question depends upon the proper construction and application of the first clause of the sixth section of the charter, (Private Laws, Vol. 4, p. 890,) which is as follows:—"That whenever it shall be necessary for the construction of their single or double railroad or way to intersect or cross any stream of water or watercourse, or any road or highway, it shall be lawful for said company to construct said railroad across or upon the same; but the said company shall restore the said stream or watercourse, or road or highway thus intersected, to its former state, or in sufficient manner not to impair its usefulness."

The railroad does not cross this highway. The word "intersect" ordinarily means the same as to cross; literally to cut into or between. The two words seem to be used in the same sense, as is apparent from the fact that the word *intersected* only is used in the latter part of the quotation; whereas, if they were used in different senses, we should expect to find the words "or crossed" also used. But if it be conceded that the word "intersect" is to be understood in the sense of touching, or coming in contact with, we think it cannot be extended so as to embrace a case like this, where the lay-out of the railroad covers a portion of the lay-out of the highway without disturbing or interfering with the traveled part of the highway. The word "restore" imports a physical impairment of the road bed itself. It is an apt word when used with reference to such a road, but is inappropriate when used with reference to a road physically complete, and to indicate the removal of an obstruction which has no connection with the traveled path, but is an obstruction only as it is calculated at certain times to frighten horses. If, in any sense, a highway, the use of which is dangerous, may be said to be restored when the danger is removed, it is manifest that such a restoration is not contemplated in this portion of the charter. A large majority of the cases to which this clause applies are road-crossings. Whether the crossing is at grade or effected by means of a bridge, there is usually some change in the construction of the highway which involves a restoration. However complete that restoration may be, the danger

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that horses will be frightened still remains. That danger is inevitable wherever the two ways are in close proximity to each other. If there is no crossing, and the road bed itself is undisturbed, no structural restoration is required. Restoration in the sense of removing all danger is impossible.

This clause in the charter therefore was not intended to impose upon the corporation the duty of removing all danger incident to the use of the railroad; consequently, a writ compelling a restoration of the highway must be denied.

The next question is, whether a writ should be granted, as prayed for, compelling the corporation to locate their railroad so as to avoid this danger. The object is to compel the defendants to re-locate their railroad.

The facts of the case more particularly pertinent to this inquiry are the following:—The lay-out of the railroad covers a portion of the western limits of the turnpike the greater part of the way for more than two miles. The space between the center line of the railroad, (which is also the center of the track,) and the east line of the turnpike, varies in width from forty-five to sixty-six feet, except for a short distance where it is only thirty-six feet, and the travel is obliged to pass east of the railroad. Trains run much faster and more frequently than they formerly did, and by reason of the increase of population and business there is more travel on the highway than formerly. On the east of the railroad track and about one rod distant from the center line is a substantial railing, erected by the defendants about three years since by order of the railroad commissioners. In many places for a considerable distance this railing was placed nearly in the center of the then traveled path.

It cannot be denied that this is an unusually dangerous place. It would seem that something ought to be done to make it less dangerous and more convenient for the public. It is not for us however to indicate the remedy. The question is, whether any legal duty now rests upon these defendants to change the location of their railroad. If any such duty exists, it will be found in some statute, public or private.

The charter authorizes the company to locate and construct

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within certain limits a railroad. They located the road, the location was approved by the railroad commissioners, and the road was constructed. In exercising the power thus conferred upon them they exhausted it. We find nothing in the charter which authorizes them to re-locate the road or any part of it. Indeed it is not claimed that such power is conferred. But it is strenuously urged that the road was not located and constructed as required by the charter. In the sixth section it is provided "that said railway shall be so located that in the construction, completion, use and occupation thereof, it shall not in any way interfere with the turnpike road of the Cheshire Turnpike Company, so as to obstruct, impede or endanger the safety of the public in traveling thereon." It is now insisted that the use and occupation of the railroad does obstruct, impede and endanger the public. If this was an open question it is difficult to see what answer could be made to this claim. But unfortunately it is *res adjudicata*. The same section further provides:—"And said corporation may apply to any judge of the Superior Court, who may by law judge between the parties, who, after notice given, may appoint three disinterested persons to determine whether said corporation has complied with the provisions aforesaid; and if approved by them, their decision shall be final."

Pursuant to this provision three disinterested persons were duly appointed by the Hon. William L. Storrs, then a judge of the Superior Court, to determine whether the company had complied with the provisions of the sixth section. The persons so appointed, after hearing the railroad company and the Cheshire Turnpike Company, and after having carefully examined the railroad as located and constructed, concluded a report of their doings in the premises as follows:—"We are of opinion and do find that the New Haven & Northampton Company have so located their said railroad, as that in the construction, completion, use and occupation thereof, it will not in any way interfere with the turnpike road of the said turnpike company, so as to obstruct, impede or endanger the safety of the public in traveling thereon; and we are of the

opinion and do find that said New Haven & Northampton Company have fully complied with the provision of said sixth section of the act aforesaid, and we do hereby approve of the same."

We can entertain no doubt that after that decision the location of the railroad under the charter was conclusively determined. It is impossible without doing violence to the language used to give to the charter and the proceedings under it any other interpretation. Neither the public nor individuals, unless by legislative action, had any power or right, directly or indirectly, to change or cause to be changed the line of the railroad or any part of it. Nor had the railroad company itself any such power. The railroad could be located but once and that had been done. Subsequent legislation allowed and provided for certain changes for the purpose of straightening curves and improving the lines of sight, but we are not aware of any enactment which authorized an entire change of the track for two miles, involving as it does the taking of other lands and interfering with individual rights of property; much less do we find in the statute any positive command to make the contemplated change. Hence the duty to do so is not clear, and the power and right to do so are at least doubtful.

We think therefore that this whole matter, including the location of the railroad, its construction, and the effect of operating it upon travel over and along the Cheshire turnpike road, is *res adjudicata*.

The only change which has since taken place is that now a greater number of persons are exposed to the danger and the danger itself is increased by reason of the greater speed and number of trains. But such change of itself, in the absence of further legislation, imposes upon the defendants no plain, positive duty. The increase of danger in the manner indicated and the increase of travel must have been anticipated and considered in the former proceedings. Such increase therefore will not justify the court in compelling the defendants to exercise a doubtful power.

In opposition to this view it is claimed that the powers and

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duties of the railroad commissioners and of the special committee related only to property rights, and that they had jurisdiction only of questions between the defendants and persons whose property was affected, and therefore that this proceeding, instituted as it is in behalf of the public, is unaffected by the doings of those tribunals.

In support of this claim stress is laid upon the fact that the commissioners only gave notice to the owners of land taken, and that the special committee only gave notice to the Cheshire Turnpike Company, and that the public had no notice to appear before either of these tribunals.

We cannot doubt that the legislature intended to protect, as far as practicable, every right and interest, either of individuals or of the public, which could be affected by the construction and operation of this railroad. Of course it was foreseen that its operation along its entire length would be attended with more or less danger. In the country where population is sparse the danger is comparatively slight. There the wisdom and vigilance of the commissioners and the interest of the railroad company to avoid as far as possible all danger were relied on to secure the construction of the road in the best place for safety. In the city of New Haven the charter provides that the company shall construct and use their road in such manner and subject to such rules and regulations as the common council of the city shall prescribe. Between these two extremes is the case of the Cheshire turnpike road. There it was obvious that the operation of the road would be attended with more than ordinary danger. Hence the special commission was to be appointed to see that the construction, use and occupation of the railroad near the turnpike road did not "obstruct, impede or endanger the safety of the public in traveling thereon." These precautions the legislature deemed sufficient for the protection of the public. If now they are found inadequate the remedy is not with the courts but with the legislature. It will hardly be contended that the Superior Court upon the complaint of the State's Attorney has power to compel the company to carry their road over or under a highway by means of a bridge,

however dangerous such crossing may be. A special act of the legislature was deemed essential for such a purpose in the case of *The Norwich & Worcester Railroad Company v. Killingly*, 25 Conn., 402. The case supposed and the case at bar are precisely the same in principle.

It is further contended that the sixth section imposes upon the defendants a continuing obligation; that although the turnpike road may have been restored to its former condition of usefulness, and so left at first that travel thereon was not obstructed or endangered, yet the road in its present state is such that travel thereon is obstructed and endangered and its usefulness is impaired. The authorities cited from our own reports in support of this claim do not fully sustain it. *Burritt v. City of New Haven*, 42 Conn., 174; *English v. New Haven & Northampton Co.*, 32 Conn., 240. Both these cases arose in the city of New Haven. By a reference to the fifth section of the charter it will be seen that the company is required to "construct and use that part of said road within the limits of the city of New Haven in such manner and subject to such rules and regulations as the common council of said city shall prescribe." By an act of the legislature passed in 1857, amending the charter of the city of New Haven, it is provided that the "court of common council shall have supervision over all bridges crossing railroads in said city, and may from time to time order the widening or repairing of said bridges in such manner and within such times as in their judgment public convenience may require." This act further provides that if any railroad company shall neglect to obey such order, the city may do the act required, and recover the expense of the railroad company. These acts controlled the cases cited, but they have no application to the case at bar.

For these reasons we advise the Superior Court that this application must be dismissed.

In this opinion the other judges concurred.

THE TOWN OF WALLINGFORD vs. HENRY F. HALL, JR.

In debt on a bond given to a town in a criminal cause, the defendant can not set off a claim against the town. The debts are not "mutual debts" within the meaning of the statute.

The town in taking the bond acts as the representative of the sovereignty of the state, and is not in the ordinary sense a creditor.

It is no defense against such a bond that the grandjuror who made the complaint in the criminal cause was, at the time the bond was given, the tenant of the magistrate before whom the case was brought and who took the bond.

Nor that the magistrate had been previously consulted with regard to matters connected with the offense, which was an assault, by the person upon whom the assault was committed.

Nor that at the time the complaint was made the accused had been previously arrested for the same offense, given bond for his appearance, and forfeited his bond.

On the record of the magistrate being offered in evidence in the suit on the bond, the defendant objected generally to its admission. In this court, upon a motion by the defendant for a new trial, a particular objection was made on account of variance. Held that, as that precise objection was not made below, it could not be made here.

The statute requires a bond to be given that the accused shall "appear and abide the order of the court." The bond taken was that he should "appear, to answer to said complaint and abide the order of the court thereon." Held that the difference was immaterial.

It was claimed that the bond, which was for the appearance of the accused at an adjourned court, was prematurely called. It appeared by the record to have been called at the hour to which the court stood adjourned. The accused did not make any appearance during the hour following. Held that, if the question could be made in this court, as presumptively the forfeiture would have been opened and the accused allowed to appear if he had presented himself within the hour, it did not appear that the defendant had suffered by the calling of the bond at the time it was called.

DEBT on a recognizance; brought before a justice of the peace and appealed by the defendant to the Court of Common Pleas for New Haven County, and there tried to the court, on the general issue, with notice of a set-off, before *Stoddard, J.* Judgment for the plaintiffs and motion for a new trial by the defendant. The case is sufficiently stated in the opinion.

W. C. Robinson, in support of the motion.

J. W. Alling and L. M. Hubbard, contra.

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CARPENTER, J. This is an action of debt on a bond taken in a criminal cause pending before a justice of the peace. On the trial in the Court of Common Pleas the defendant interposed several matters of defence.

In the first place, he claimed that the magistrate who took the bond had no jurisdiction of the cause pending before him. This claim rested on two grounds, neither of which appeared of record: 1st, that Mr. Wooding, the party alleged to have been injured in the criminal complaint, (the charge being a breach of the peace,) had previously consulted with the magistrate concerning certain transactions between the parties in some way connected with the affair out of which the prosecution arose; and 2d, that the grandjuror who issued the complaint was a tenant of the magistrate.

Whatever weight, if any, these objections might have been entitled to, had they been properly presented on the trial of the criminal cause, is a matter of no consequence now. They are entitled to no consideration in this proceeding. The magistrate had jurisdiction upon the face of the complaint and warrant. Any objection to the jurisdiction depending upon facts *dehors* the record should have been made before the magistrate in that proceeding, and in that proceeding alone. The defendant cannot take advantage of them in this case.

The defendant next objects that the party accused had been previously arrested on a complaint duly issued for the same offence, had given bonds for his appearance, and had forfeited his bonds; and that this was a bar to the complaint and proceeding on which the bond in the present suit was taken.

If there is any force in this objection any where or at any time, (we do not intend to intimate that there is,) the defendant cannot avail himself of it in this suit.

The plaintiff offered as a witness the magistrate for the purpose of proving and identifying the record in the criminal cause, including the recognizance in suit. The defendant then and before the close of the direct examination, insisted upon his right to cross-examine the witness upon that point. The plaintiff stated that he simply wished to identify another

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paper as the original process and that then he should be through with the witness. The court allowed that to be done, and the defendant then cross-examined the witness. Perhaps technically the record should not have been received until after the cross-examination. We are inclined to think however that the error in this respect, if there was any, resulted in no harm to the defendant. The motion does not show that there was any defect in the formal proof of the record. There were objections of a different nature, which were subsequently made and which we will presently consider. Those objections were heard and decided. We are inclined to think that the reception of the record before cross-examination was merely formal, and that it is a fair inference from the record that all objections either of form or substance were fairly entertained and passed upon by the court.

To the admission of the record in evidence the defendant objected generally. The grounds of the objection do not appear in the motion. The counsel for the defendant in his brief makes the objection on three grounds:—1st. On the ground of a variance. This objection should have been specifically made in the court below. As it does not appear that it was, we must decline to consider it here.—2d. That the statute requires a recognizance with surety, conditioned that the accused shall appear “and abide the order of the court.” The recognizance in this case required the accused to appear “to answer to said complaint and abide the order of the court thereon.” The addition of the words “to answer to said complaint” does not change the meaning, and therefore, does not vitiate the bond. Its terms “are in substantial compliance with the requirements of law,” and that is all that is required. Gen. Statutes, p. 545, sec. 1.—3d. That the bond was prematurely called and forfeited. If it be conceded that the record fairly imports that the bond was called immediately after the hour to which the cause was adjourned had arrived, we still think that the proceeding was valid. Had the accused appeared within the hour and claimed a trial, presumptively the court would have granted it. But there is no claim that he did appear, and nothing to show that the

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defendant has suffered by reason of calling the bond before 8 o'clock. If therefore an objection of this nature can be made in this way and at this time, we do not think there is any force in it.

The last and perhaps the most important question is, whether the defendant was entitled to a set-off. He presented a claim against the town growing out of the pauper laws, and insisted that he had a right to prove the same and have it set off against the plaintiff's demand. The plaintiff objected to the evidence and the court rejected it.

The statute allows a set-off of mutual debts between the same parties. The plaintiff's demand is in one sense a debt, and so the claim of the defendant against the plaintiff if sustained is also a debt; so that there is at first sight a plausibility in the claim that a set-off should be allowed. But it is more plausible than sound. The recognizance in suit was simply a means of compelling the attendance of the party accused of crime to answer to the complaint and abide the order of the court thereon. This suit is a proceeding devised by law for the administration of criminal justice. The town is simply the agent or instrument of the sovereignty of the state in enforcing criminal law. It is more than that, it is a part of and stands for the sovereign power of the state; and in respect to this question stands on as high ground as the state itself. The criminal prosecution, although instituted by an officer elected by the town, is in the name of the state, and the grandjuror prosecuting is in the exercise of governmental power in the highest sense. For the convenience of administration towns are required to pay costs in certain cases, when there is a failure to convict, and certain bonds in the course of criminal prosecutions are required to be taken to the towns. But that does not change the nature and essential character of the proceeding. It is still the state acting through and by means of the town. It will not be contended that a bond taken to the state would be liable to a set-off. With as little reason will a set-off be allowed in cases of bonds taken to subdivisions of the state. The legislature could not have intended that the state, counties, cities, and

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towns in the administration of criminal law should be involved in litigating stale, frivolous and disputable claims of a civil nature. While therefore the plaintiff's demand is in some sense and for some purposes a debt, yet we think it is not a debt within the meaning of the statute of set-off, and that the evidence offered by the defendant was properly rejected.

For these reasons a new trial must be denied.

In this opinion the other judges concurred.

HENRY PERRY vs. CHRISTOPHER C. POST AND ANOTHER.

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m74 176

The statute (Gen. Statutes, tit. 19, ch. 2, secs. 23, 27,) provides for the giving of a bond with surety by a defendant in substitution for property attached in the suit, by which the obligors bind themselves to pay the judgment that may be recovered, or the actual value of the interest of the defendant in the attached property. Held, in a suit on such a bond, that in assessing the damages the value of the property at the time the bond was given was to be taken, and not its value at the time of the judgment rendered or demand made.

DEBT on a bond given for attached property; brought to the Superior Court in New Haven County, and tried to the court, on the general issue, with notice, before *Hovey, J.*

The bond was given under the statute (Gen. Statutes, p. 406, sec. 23,) which provides that when any estate shall be attached, the defendant may apply to a judge of the court in which the action is pending, to dissolve the attachment lien, upon the substitution of a bond with surety; later sections directing as to the form of proceeding, notice to the adverse party, the amount of the bond, and its form.

In the suit in which the bond was taken the officer was commanded to attach the property of the defendants in that suit, the Simpson Waterproof Manufacturing Company, to the amount of seven thousand dollars, and the property attached consisted of a large quantity of steam pipe and machinery in the factory of the company. The bond stated

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the value of the attached property as estimated to be \$7,000, and was for that amount, and was conditioned for the payment of the judgment that might be recovered in the suit, not exceeding the amount of the bond. The plaintiff recovered judgment in the suit for \$2,593 damages, and \$414 costs of suit.

The notice given by the defendants under the general issue was, that they should offer evidence that the Simpson Waterproof Manufacturing Company, previous to the attachment, had sold out its interest in the property and had been dissolved; and that the value of the property did not exceed \$300.

Upon the trial the defendants, under the notice appended to their plea, offered evidence to prove the value of the property attached, at the time when the judgment was recovered by the plaintiff against the Simpson Waterproof Manufacturing Company, and when demand was made upon the defendants; but upon objection of the plaintiff the court excluded the evidence.

They also offered to prove the value of the property if the same had been sold by the officer by public auction in the manner provided by statute for the sale by an officer of property taken on execution, but the court, upon objection made by the plaintiff, excluded the evidence.

The court rendered judgment in favor of the plaintiff, for the sum of \$1,869, which was found to be the actual value, at the time the bond was given, of the interest of the defendants in the former suit in the property.

The defendants moved for a new trial for error in this ruling of the court.

A. S. Treat and C. R. Ingersoll, in support of the motion, cited *Dehler v. Held*, 50 Ill., 491; *Suydam v. Jenkins*, 3 Sandf., 617; *Carpenter v. Stevens*, 12 Wend., 589; *Shaw v. Laughton*, 20 Maine, 266; *Tuck v. Moses*, 58 id., 469; *Mattoon v. Pearce*, 12 Mass., 406; *Rich v. Bell*, 16 id., 294; *Brooks v. Hoyt*, 6 Pick., 468; *Swift v. Barnes*, 16 id., 194; *Whitwell v. Wells*, 24 id., 33; *Parker v. Simonds*, 8 Met.,

205; *Bartlett v. Kidder*, 14 Gray, 449; *Davis v. Harding*, 3 Allen, 304; *Leighton v. Brown*, 98 Mass., 516; *Mason v. Haile*, 12 Wheat., 370; *Wells v. Abernethy*, 5 Conn., 222, 227; *Clark v. Smith*, 10 id., 1; *Green v. Barker*, 14 id., 434; *Palmer v. Gallup*, 16 id., 555; *West v. Pritchard*, 19 id., 215.

H. S. Sanford, contra.

PARK, C. J. The question in this case is as to the correctness of the rule of damages adopted by the court below in rendering judgment for the plaintiff. The court assessed damages to the amount of the value of the actual interest which the Simpson Waterproof Manufacturing Company had in the property attached at the time the bond in question was given; and ruled out evidence offered by the defendants to show the value of such interest at the time when the judgment was rendered in the original suit.

The question then is, whether in an action on a bond, substituted for an attachment of property under the statute, damages shall be assessed to the amount of the value of the property attached at the time the bond was given, not exceeding the judgment rendered in the suit in which the attachment was made, or to the amount of the value of such interest at the time the judgment was rendered. The defendants insist that the true rule of damages under the statute is the value of the property at the time when the judgment was rendered. Their claim is based on the theory that the bond is a substitute for the lien created by the attachment, and not for the property attached; and that therefore when the judgment was rendered in the original suit, the bond substituted for the lien on the property represented the attachment lien, and could be of no more value at that time than the attachment would have been if it had not been dissolved; and inasmuch as the value of the attachment would have been measured by the value of the property, so also the value of the bond should be determined by the same rule. Hence they conclude that inasmuch as the bond could not be broken

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till the judgment was rendered, its value at that time is the measure of damages.

But the argument is fallacious. The fallacy lies in the premises. The bond was not substituted for the attachment lien, but for the property attached. If it was a substitute for the lien, then if the property was destroyed the bond would cease to have any binding obligation; its virtue would be gone, like an attachment lien on property destroyed. This is not so. If the property were destroyed the bond would remain with all its original obligation.

The defendants further claim that the obligation of the bond is like the obligation of a receipt given to an officer to release property attached. But there is but little analogy in the cases. The obligor in a receipt has the privilege of returning the property to the officer in fulfillment of his obligation; but the obligor in a bond of this character has no such privilege. He undertakes absolutely to pay the amount of the bond, if it should prove to be equal to or less than the amount of the judgment rendered in the suit in which it was taken. He undertakes to secure the future contingent judgment at all events, to the amount of the bond.

For a like reason there is no analogy between a bond of this character, and a bail-bond given to an officer, or a bond given for the appearance of a party in a criminal proceeding. In both of these cases cited by the defendants as analogous, the bond is fulfilled by the production in court of the party named in it. The party is regarded as in the custody of the bail in the meantime, as property attached is considered in the care and custody of the receptor awaiting the judgment to be rendered in the case.

We think it clear that the bond in this case took the place of the property attached. The statute provided a tribunal to determine the value of such property at the time the substitution was made, and required that the bond should equal that value in amount. No time is mentioned in the statute with reference to which the valuation shall be made, but the implication is strong that it shall be made with reference to the time when the hearing upon the application for the bond is had.

This construction of the statute approaches nearer to justice between parties than any other which can be given. The property may rise in value, and it may fall. The probabilities regarding it may balance each other. The bondsman may fail and become irresponsible. To balance this uncertainty the plaintiff, on the bond being given, is relieved of any further trouble concerning the property. Should he fail in his suit, he will have no large bills of expense to pay for keeping the property under attachment.

The construction contended for by the defendants would manifestly work injustice. The attached property may be a store of dry goods. The goods may be sold, and scattered beyond discovery before judgment shall be rendered, when the plaintiff would have no opportunity of showing their value.

We do not advise a new trial.

In this opinion the other judges concurred.

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62	138
45	358
70	695
45	358
71	39

STATE vs. SARGENT & COMPANY.

The owners of land bounded on a harbor own only to high-water mark. They have a right to construct wharves upon the soil below that line, if they conform to such regulations as the state shall see fit to prescribe, and do not obstruct navigation.

The duty of protecting the paramount right of navigation rests upon the legislature, and they are to determine for themselves by what methods and instrumentalities they will discharge it.

They have power to vest in commissioners appointed by themselves authority to restrain such proprietors from extending structures into navigable waters.

The enactment of such a law is in no sense an exercise of the right of eminent domain. The public do not appropriate or use any right of the land-owner in the soil of the shore.

The act of 1872, establishing a board of commissioners for New Haven harbor, to be appointed by the Governor with the advice of the Senate, in one section gives the board power to prevent and remove encroachments upon the waters of the harbor, in another section authorizes them to prescribe harbor lines beyond which no structure should be extended, giving notice to all persons

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interested to appear and be heard and making a report to the General Assembly, and in another section makes any structure within the tide-waters of the harbor, not approved by the commissioners, a public nuisance, and authorizes the commissioners to bring suits in the name of the State to stop any such erection. Held—

1. That the act was constitutional and valid.
2. That it was not necessary for the commissioners to establish a general harbor line before forbidding or removing any particular encroachments.

The act was passed in 1872. By the revision of 1875 it was provided that all public laws not contained in the revision, except acts which though public in form were of a private nature, and some others, were thereby repealed. This act was not contained in the revision. By an established custom the acts of each year were published by the secretary of the state in two pamphlets, one called "Public Acts," and the other "Private Acts and Resolutions." This act was published among the private acts for the year 1872. Held that it was to be presumed that the legislature acted with reference to this usage and to the classification made by the secretary in this instance, and intended to preserve the act in question under the description of acts which though public in form were of a private nature.

PETITION in the name of the State, by the board of harbor commissioners for New Haven harbor, to the Superior Court, for an injunction restraining the defendants, a corporation, from constructing a wharf or other structure from their own land into the harbor, beyond a certain limit, without the approval of the harbor commissioners.

The following facts were found by the court:—

The board of harbor commissioners for New Haven harbor was organized in October, 1872, under the act of the General Assembly of June 27th, 1872, and, when the present suit was brought, was composed of the persons named in the petition.

The respondent corporation of "Sargent & Company" was, when the suit was brought, and, with its grantors, for more than fifteen years prior thereto had been, the owner, and in actual possession, of the upland comprised within and bounded by Wooster street on the north, East street on the east, Hamilton street on the west, and Water street on the south, in the city of New Haven, and had also, for the same period, with its grantors, claimed title to a water lot or piece of flat land within the shore of New Haven harbor, bounded on the north by Water street, between East and Hamilton streets; which title was derived, by sundry mesne conveyances, from the proprietors of the common and undivided

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lands of the town of New Haven, and purported to convey to said Sargent & Company all that portion of said shores, bounded northerly as aforesaid, fronting their said upland and extending, in some places nine and in other places ten rods, southerly into the harbor.

The proprietors referred to had no other title to the shore lot described in the deeds than such as they may have derived from the charter of Connecticut, or the acts of the General Assembly.

Prior to June, 1877, Sargent & Company and their grantors had, under the foregoing claim of right, filled in with earth a portion of the shore, between high and low water marks, fronting their upland, so that between Wallace and Hamilton streets the new ground so made extended nearly five hundred feet from the southerly line of Water street.

On the 8th of June, 1877, Sargent & Company advised the board of harbor commissioners that they proposed to construct certain wharves, with slips, which should extend from the new made ground before referred to, to a point in the harbor fourteen hundred feet from Water street; and they submitted to the board a plan of their proposed work, and requested a permit for its construction.

On July 2d, 1877, the board notified Sargent & Company that, upon consideration of their application, they had voted that, pending the establishment of an extension harbor line between Tomlinson's Bridge and Long Wharf, permission was granted them to build wharves in front of their property to a distance not exceeding eight hundred feet outward from the southerly line of Water street.

On the 7th of July, 1877, Sargent & Company returned the notification of permit to the board endorsed "declined and returned," and they proceeded to build walls and drive piles, in substantial accordance with their original plan, until, at the bringing of the present petition, a line of such work, to form one side of a proposed wharf, had been built, extending outward into the harbor eleven hundred and forty-eight feet from Water street.

The wall so built and piles so driven since July 7th, 1877,

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and the structures contemplated by the plan aforesaid, are within New Haven harbor, as defined by section 9 of the act of June 27th, 1872.

Upon these facts the case was reserved for the advice of this court.

The following is the material part of the act of 1872, under which the harbor commissioners were appointed and acted:—

"AN ACT TO ESTABLISH A BOARD OF HARBOR COMMISSIONERS FOR NEW HAVEN HARBOR.

"Be it enacted, &c.

"SEC. 1. The Governor, with the advice and consent of the Senate, shall, before the first day of July next, appoint five competent persons, resident in the city of New Haven, or in the town of East Haven, who shall constitute a Board of Harbor Commissioners for New Haven harbor, and who shall hold their offices from the dates of their respective appointments, and for the terms of one, two, three, four and five years, respectively, from the first day of July next; the term of each to be designated at the time of his appointment, respectively, from the first day of July next. The Governor shall, in like manner, before the first day of July in every year after this year, appoint a commissioner to continue in office for the term of five years from said day. * * *

"SEC. 2. Said Board of Harbor Commissioners shall have the general care and supervision of New Haven harbor and its tide-waters, and of all the flats and lands flowed thereby, in order to prevent and remove unauthorized encroachments, and causes of every kind which are liable to interfere with the full navigation of said harbor, or in any way injure its channels, or cause any reduction of its tide-waters. They may, from time to time, make such surveys, examinations and observations as they may deem necessary in said harbor for said purpose, and employ for these purposes competent engineers, and also employ such clerical and other assistance as they may think necessary. * * *

"SEC. 3. Whenever in the judgment of said board the public good requires, they may proceed to prescribe harbor

lines in said harbor, beyond which no wharf, pier, or other structure shall be extended into said harbor, and shall report the same for the consideration of the General Assembly at its next session: provided however, that said commissioners, before drawing any such line, shall appoint a convenient time and place for hearing all persons interested, and shall give notice thereof by publication two weeks successively, in two or more newspapers published in the city of New Haven, the first publication to be at least twenty days before the time of hearing.

"SEC. 4. All persons contemplating the building over said harbor and tide-waters any bridge, wharf, pier or dam, or the filling any flats, or driving any piles below high-water mark, shall, before beginning it, give written notice to said commissioners of the work they intend to do, and submit plans of any proposed wharf or other structure, and of the flats to be filled, and of the mode in which the work is to be performed; and no such work shall be commenced until the plan and mode of performing the same shall be approved in writing by a majority of said commissioners; and said commissioners shall have power to alter said plans at their discretion, and to prescribe the direction, limits, and mode of building the wharves and other structures, and all such works shall be executed under the supervision of said commissioners.

"SEC. 6. Any erection or work hereafter made in any manner not sanctioned by said commissioners, where their direction is required as hereinbefore provided, within tide-waters flowing into or through said harbor, shall be deemed, and is hereby declared to be, a public nuisance. Said commissioners shall have power to order suits in the name of the State to prevent or stop, by injunction or otherwise, any such erection or other nuisance in the tide-waters flowing into or through said harbor, and such suits shall be conducted by and at the expense of the city of New Haven.

"SEC. 7. Said commissioners are authorized and empowered, whenever they deem it necessary, to apply to Congress for appropriations for protecting and improving said harbor.

"SEC. 8. All expenses incurred by said commissioners

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shall be paid by the city of New Haven, in the same manner as is now provided in the charter of said city for the payment of other claims and accounts; but no contracts shall be made and no acts done by said commissioners, which involve the payment of any money from the treasury of said city, except as herein provided, without an appropriation expressly made for that purpose by the Court of Common Council of said city.

"SEC. 9. [Describes the boundaries of New Haven harbor.]

"SEC. 10. Nothing contained in any of the provisions of this act shall be construed to authorize or empower said commissioners to grant or convey to any person or persons any right or title in or to any of the tide-water flats of said harbor.

"SEC. 11. This act shall take effect from its passage.

"Approved, June 27th, 1872."

C. R. Ingersoll and T. E. Doolittle, for the State.

1. It is now settled law in the United States that the several states (subject to the limitations of the federal constitution) are sovereign over their respective sea-shores and tide-waters—that, unless parted with by colonial legislation, they have succeeded to all the rights in this respect which both crown and parliament possessed at common law; having, not only the *jus publicum*, or right of governing the sea and sea-shore for the protection of public rights, but also the *jus privatum*, or title to the soil itself of the shore below high-water mark. *Martin v. Waddell*, 16 Pet., 410; *Barney v. Keokuk*, 94 U. S. R., 324; *McCready v. State of Virginia*, id., 391; *Church v. Meeker*, 34 Conn., 429. But this title to the shore is held by the state, as it was held by the crown, not as a private title, but in trust for the public use and benefit. *Gann v. Free Fishers of Whitstable*, 11 Clark's House of Lords Cases, 192; Angell on Tide-Waters, 80. It is by reason of this sovereignty that the states control and regulate by their legislation the use of the navigable waters within their respective jurisdictions, and that the sanction of such legis-

lation is necessary to justify any interference by the individual citizen with the ordinary flow of those waters, except in the exercise of his public or common right. Thus, this power of control has been recognized in the establishment of harbor lines and regulation of wharf rights. *Commonwealth v. Alger*, 7 Cush., 53; *Att. Gen. v. Boston & Lowell R. R. Co.*, 118 Mass., 345; *Att. Gen. v. Woods*, 108 id., 436; Cooley's Const. Lim., 589; Angell on Tide-Waters, 236. In the appointment of harbor-masters. *Vanderbilt v. Adams*, 7 Cow., 349. In the removal of obstructions to navigation. *Hollister v. Union Co.*, 9 Conn., 436. In the regulation of draw-bridges and dams. *Bridge Co. v. Bunnell*, 4 Conn., 54; *Holyoke Co. v. Lyman*, 15 Wall., 500. In the construction of public works, such as dams, roads, docks, &c., although rendering the land of the riparian owner inaccessible. *Lansing v. Smith*, 4 Wend., 9; *Gould v. Hudson River R. R. Co.*, 6 N. York, 522; *People v. Tibbetts*, 19 id., 523; *People v. Canal Appraisers*, 33 id., 461; *Atlee v. Packet Co.*, 21 Wall., 394; *Barney v. Keokuk*, 94 U. S. R., 324. In the regulation of fisheries. *McCready v. State of Virginia*, 94 U. S. R., 391; *Chalker v. Dickinson*, 1 Conn., 510.

2. This title to the shore, which the colony of Connecticut acquired by its charter, was never parted with. *East Haven v. Hemingway*, 7 Conn., 202; *Church v. Meeker*, 34 id., 429. But a usage, obtaining the force of a local common law, gave to the proprietor of the upland a privilege of wharfing out against his land into the tide-waters. But this privilege is subservient to the paramount public right of navigation. It allows nothing to be done under it "to the injury of the free navigation of the water by the public." *Mather v. Chapman*, 40 Conn., 395. And anything that may be done under it is "subject to the right of the public to abate it, if it be a nuisance." *Nichols v. Lewis*, 15 Conn., 143.

3. But it is of little consequence, in this case, whether this privilege of the upland proprietor is a right of private property or not. In either case, any damage it may be subjected to by such regulation as this in question, is *damnum absque injuria*. In Massachusetts such proprietor has a title

in fee-simple to a certain extent of shore. But it does not exempt him from the operation of similar regulations. *Commonwealth v. Alger*, 7 Cush., 63. And so in the other cases before cited. "The state, in its sovereign character, owns the bed of navigable streams to high-water mark, and the right of a riparian owner is subservient to the power in the state to abridge or destroy it at pleasure." *People v. Tibbetts*, 19 N. York, 523; *Musser v. Hershey*, 42 Iowa, 361; *Barney v. Keokuk*, 94 U. S. R., 391.

4. The deeds from the proprietors' committee to the grantor of the defendants do not help the defendants, for the proprietors had no title to the shore. *Church v. Meeker*, 34 Conn., 429.

5. The act of 1872 has not been repealed by section 1, title 22, of the General Statutes. The question which here arises is: Did the General Assembly by this provision *intend* to repeal the act referred to? Dwarrris on Statutes, 690, 699, 701, 704; 1 Kent Com., 462; *Bishop v. Vose*, 27 Conn., 9. Applying these rules of construction it becomes clear that the General Assembly intended by the phrase "acts of a private nature," those acts which the General Assembly commonly styles "private acts," or "special acts," and which comprise acts "*local* in their nature though public in form," and are by the General Assembly distinguished from the "General Statutes," which relate to the state at large. Now the act establishing the board of harbor commissioners for New Haven harbor was, when it was published by the General Assembly, declared to be a special act. For years the General Assembly has published its acts in two classes, one denominated by itself as the "Public Acts," and the other as the "Private Acts," or "Special Acts." And those "Private Acts" so published have been authenticated by the General Assembly and made evidence in its courts of justice. The act now in question was so published by the General Assembly in 1872, and thus authenticated to be a special act, and not a public act in the sense of a general statute. *Eld v. Gorham*, 20 Conn., 16. But the meaning of the General Assembly is apparent upon an examination of the title in question itself.

Its provisions are declared to be "for defining and establishing the *general* statutes." It was not intended to interfere with any other legislation than such as was embodied in the "General Statutes" or "Public Acts" of the state. The distinction between public and private acts has always been known to the common law. "Private acts," says Dwaris, were originally "such petitions and answers as did not appear on the statute roll, or in the collection of acts." On Statutes, 627. He divides acts into "public and general" and "private and special." Public acts relate to the kingdom at large. But "acts relating to any particular place, or to divers particular towns, or to one, or to divers particular counties, or to colleges only in the universities, are private acts." p. 629. The act in question is a private act, because it is a local act. It is not a public act, because it does not embrace within its jurisdiction the whole state. *Woodward v. Cotton*, 1 C. M. & R., 44; 1 Swift Dig., 10.

6. The construction claimed for the act by the defendants denying any efficacy to sections 4 and 5, until harbor lines have been established under section 3, is not warranted by either the letter or spirit of the act. There is nothing whatever in its language evincing that the commissioners were not to "have the general care and supervision of New Haven harbor, *in order to prevent or remove unauthorized encroachments*," until the time in the indefinite future when the public good might require the establishment of a general system of harbor lines. On the contrary, the language is clear and explicit. The act was to take effect from its passage. And when it took effect the board of commissioners (when appointed) was charged with the duties so pointedly declared in section 2, and which require the powers conferred by section 4 for their proper discharge. And the spirit of the act in all its parts is to provide at once for the protection of this public highway from private encroachment and for the regulation of the common rights existing there.

J. S. Beach and *H. B. Harrison*, for the defendants.

1. It is well settled in Connecticut—1st. That the state

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is not, in every respect, the absolute owner of the shores and flats, to the exclusion of all rights of the owners of the uplands therein. 2d. That the owners of the uplands are not, in every respect, the absolute owners of such shores and flats, to the entire exclusion of all rights of the state therein. 3d. That the state has certain fixed and vested rights in reference to such shores and flats, and the upland-owners have certain fixed and vested rights therein, and that each of these two sets of rights must be exercised so as not to violate the other. 4th. That the state technically owns the fee of the land below high-water mark—but owns it only “in trust” for the public for the purpose of protecting the public right of navigation, and for no other purpose; so that, though theoretically vested with the fee, the state has none of the ordinary rights of an owner in fee in reference to such land. 5th. That the owner of the upland, although he has no right to use such land so as to materially obstruct navigation, possesses, in reference to such land, all the other rights which properly belong to an owner of land in fee. He has a right to wharf out upon and over such land to the channel; he may maintain ejectment for such land upon which he has so wharfed out, and the theoretical title of the state in fee cannot be set up to defeat his action; his title to such land will descend to his heirs at law; he may sever from his upland his interest in the flats, and convey that interest, apart from the upland, in the same manner as if he owned the flats in fee. *East Haven v. Hemingway*, 7 Conn., 186; *Chapman v. Kimball*, 9 id., 38; *Nichols v. Lewis*, 15 id., 137; *Simons v. French*, 25 id., 346; *Frink v. Lawrence*, 20 id., 117; *Burrows v. Gallup*, 32 id., 493, 500; *Church v. Meeker*, 34 id., 427. In substance, then, the owner of the upland is the owner of the shores and flats to the channel, without the right of materially obstructing navigation. And in substance the state has no ownership of such shores and flats; but its only substantial right in reference to them is the right of protecting against obstructions to navigation the waters which ebb and flow over them. See cases above cited; also *Angell on Tide-Waters*, 207; *Commonwealth v. Alger*, 7 Cush., 53, 65,

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74, 80; *Yates v. Milwaukee*, 10 Wall., 497, 504; *Weber v. Harbor Commissioners*, 18 Wall., 57, 64; *Keyport Steamboat Co. v. Farmers' Transportation Co.*, 18 N. Jer. Eq., 13.

2. As this right of the state to protect navigation belongs to it, not as a land-owner but as a *sovereign*, it is a right which can only be exercised by legislation; by the enactment of *laws*, duly made, in subordination to the constitution, by the General Assembly. Those fundamental principles which defend the property of the individual against arbitrary invasion by the state, are applicable to such laws as much as to any other laws.—1st. Such laws, like all others, must be made by the General Assembly itself. The legislature cannot delegate to a committee the power to make them.—2d. Every such law must be, not merely in form but in fact, a *law*—a rule of action imposed on all citizens, (or upon all citizens of a specified class or within a specified locality)—and not a decree against a particular individual.—3d. Every such law, so far as it limits the wharf-rights of the owners of uplands, must be, in substance and spirit, a law regulating the exercise of those rights for the benefit of navigation; and not, in substance and spirit, an enactment destroying such rights “without due process of law” or taking them away without “just compensation.” *Commonwealth v. Alger*, 7 Cush., 53; *Yates v. Milwaukee*, 10 Wall., 497; *Weber v. Harbor Commissioners*, 18 id., 65; *Lake View v. Rose Hill Cemetery Asso.*, 70 Ill., 191, 197. The statute of 1872 purports to be, (and, upon our interpretation of it, is in fact,) such a law, duly enacted, in conformity with the constitutional principles above asserted. If however our interpretation of it is wrong, and if the true interpretation of it puts it in conflict with any of those principles, it is unconstitutional and void. The court will therefore give to the statute, if possible, an interpretation which will not put it in conflict with any of those principles.

3. The statute is, in some respects, obscure; but its controlling purposes are plain. It contemplates—1st. A general supervision of the public rights in New Haven harbor by a board of harbor commissioners.—2d. The establishment of a harbor-line if the “public good” shall require the limitation

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of the wharf-rights of upland-owners by any such harbor-line; but not otherwise.—3d. The decision by the General Assembly, (and not by the harbor commissioners,) of the question whether (and, if ever, when,) the “public good” requires such limitation of the rights of upland-owners by any such harbor-line.—4th. The establishment of such harbor-line (if it shall be established at all) by the General Assembly itself, and not by the harbor commissioners.—5th. The prevention and punishment of transgressions of any such harbor-line, if, and after, such harbor-line shall be so established.—6th. Superintendence by the harbor commissioners, (*after* such harbor-line has been established,) of those details of wharf-construction which, from the nature of the case, cannot be prescribed by any statutory regulation. Such is the substance of the act. This construction is reasonable, and gives full effect to section 3d, as well as to every other section of the act. “All statutes, whether remedial or penal, should be construed according to the apparent intention of the legislature, to be gathered from the language used, connected with the subject of legislation, and so that the entire language shall have effect, if it can, without defeating the obvious design and purpose of the law. And in doing this, the application of common sense to the language is not to be excluded.” CHURCH, C. J., in *Rawson v. The State*, 19 Conn., 299. See also *Bishop v. Vose*, 27 Conn., 9; Sedgwick’s Stat. & Const. Law, 238. We do not ask the court to go outside of the language of the statute in order to find the intention of the legislature. But we claim that full effect shall be given to its intention as manifested by the language of the statute. At the same time, inasmuch as the statute is highly penal in character, we claim that it must be construed liberally in favor of this respondent, and strictly as against the state.

4. The act does not mean to give the commissioners, (before and without the establishment of any harbor-line,) the power of selecting, at their caprice, one or another of the upland owners, and, by their mere veto, without any judicial process or inquiry, absolutely extinguishing his right of wharfage.—1st. The General Assembly itself could not thus

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single out, at its pleasure, a particular upland-owner, and, by an enactment under the form of a law, extinguish his rights. Such an enactment would not be a "law." It would be a mere arbitrary decree, outside of the powers of a constitutional government. *Goshen v. Stonington*, 4 Conn., 225; *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 id., 38; *Welch v. Wadsworth*, 30 id., 150; *Bostwick v. Isbell*, 41 id., 305; Cooley Const. Lim., 90, 91; Sedgwick Stat. & Const. Law, 166. It would be an attempt to deprive the citizen of his property without "due process of law." It would be an attempt to destroy rights under pretense of regulating the exercise of rights.—2d. If the General Assembly could not itself constitutionally issue such a decree against a particular upland-owner, much less could it constitutionally confer upon a board of commissioners the right of issuing such a decree. *Yates v. Milwaukee*, 10 Wall., 497, and other cases above cited; Cooley Const. Limitations, 116; Sedgwick Stat. & Const. Law, 149, 177.—3d. The General Assembly having manifested in section 3d its intention to limit the rights of upland-owners, only after due inquiry, with previous "notice" to, and "hearing" of, "all persons interested," and only then by a harbor-line applicable equally to all of them, it will hardly be pretended that the same General Assembly intended, at the same time, by section 4th, to extinguish utterly at one blow all those important rights of property, without any such inquiry, notice or hearing, leaving the revival or partial revival of those rights, in each individual case, to the arbitrary and unlimited discretion or caprice of the harbor commissioners.—4th. If such be the true construction of the act, then the act is void; first, as destroying absolutely rights of property under pretence of regulating the exercise of them, (rights which the state has power only to regulate, but not to destroy, except, so far as they will necessarily be destroyed by an act of real and *bona fide* regulation,) and thereby depriving the citizen of his property without due process of law; and, secondly, as an attempt, in effect, to delegate to the harbor commissioners the power of legislation—or rather, as above stated, the power of determining by

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their capricious decrees, and without appeal, whether valuable rights of property of individual citizens shall be exercised by them or not.

5. The statute of 1872 has been repealed. Revision of 1875, tit. 22, p. 551. Section 1st of that title is as follows: "All public laws not contained in the foregoing titles, except acts of incorporation, confirming acts, acts which though public in form are of a private nature, and all public laws, except such as by particular provision and this title are continued in force, are repealed." The statute of 1872 does not come within any of the exceptions above specified. 1st. It is not only "public in form," but it is public in "nature." It creates a board of officers who are officers of the state at large. Those officers are appointed by the governor and the senate acting concurrently. They are commissioned in the name of the state. Their functions are, in their nature, the functions of officers of the state. The commissioners are instrumentalities by means of which the state exercises its high public right as a sovereign, to protect navigation within its limits. They are required by section 3d to report to the General Assembly their acts under that section. They are authorized, as agents of the state, to institute suits in the name of the state. This very suit is prosecuted by them in the name of the state. They are also authorized to represent the state in applications to Congress for appropriations. Although the act relates, in one sense, to a particular locality, that fact does not make the act "private" in nature. The act is designed to protect the rights and promote the interests of all persons who may be interested in the navigation of New Haven harbor—not merely the people of New Haven, but all citizens of this state, and of the United States, and of other countries, who may have occasion to use the harbor. And the prohibitions of the statute apply to all persons. All persons are forbidden by it to interfere with the harbor in the ways prohibited. *Cooley's Const. Limitations*, 390; *People v. Allen*, 42 N. York, 378; *State v. County Commissioners*, 29 *Maryl.*, 516; *Pierce v. Kimball*, 9 *Greenl.*, 54; *Commonwealth v. McCurdy*, 5 *Mass.*, 324; *Burnham v. Webster*, *id.*,

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266; *New Portland v. New Vineyard*, 16 Maine, 69; *Gorham v. Springfield*, 21 id., 58; *State ex rel. Cothren v. Lean*, 9 Wis., 279; *Clark v. Janesville*, 10 id., 136; *Levy v. The State*, 6 Ind., 281; *Rogers's Case*, 2 Greenl., 303; *U. States v. Porte*, 1 Cranch C. C., 369; *Fall Brook Coal Co. v. Lynch*, 47 How. Pr. R., 520; *Heridia v. Ayres*, 12 Pick., 334, 344. A decisive criterion of the public "nature" of the act is to be found in the fact that it made criminal, indictable, and punishable by fine and imprisonment, certain things which, but for this statute, would not have been criminal, indictable or punishable. *State ex rel. Cothren v. Lean*, 9 Wis., 281; *Rogers's Case*, 2 Greenl., 303; *U. States v. Porte*, 1 Cranch C. C., 369; *Heridia v. Ayres*, 12 Pick., 334, 344; Sedgwick Stat. & Const. Law, 33. Under section 6th an upland-owner who drove piles into the harbor without in the least obstructing navigation in fact, and who, by so doing, would not (but for this statute) have been guilty of creating a public nuisance, might be, (and under the petitioner's construction of the statute would have been,) by omitting to get the sanction of the commissioners for the driving of the piles, guilty of committing a "public nuisance" within the letter and meaning of that section. Such an act would have been a criminal offence at common law; and punishable by fine and imprisonment as such.

PARDEE, J. By the common law as it stood long before the coming of our ancestors to this country and the settlement of the colony of New Haven, the king, as *parens patriæ*, held the title to the soil under the sea between high and low water mark; he held it not for his own benefit but for his subjects at large, and for the subjects of all states at peace with him; he held it in trust for public uses, established by ancient custom or regulated by law, the most important of which are those of fishing and navigation. In 1662 Charles II granted all the lands of the colony by charter to the free-men incorporated thereby. This court said in *Church v. Meeker*, 34 Conn., 421, that there had been in this state no judicial determination of the question whether or not that

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charter conveyed the royal title to the shores of the sea; that the Supreme Courts of Massachusetts, New Jersey and of the United States, having each decided that similar grants did, under the head of "royalties," convey such title, this court would follow them and declare that the title to the "shores of the sea" vested in the freemen of the colony before the king was excluded by the revolution and independence; and that they, through their legislature, may therefore now exercise all the powers which previous to the grant could have been exercised either by the king alone or by him in conjunction with his parliament, subject only to those restrictions which have been imposed by the constitution of this state or of the United States.

The respondents as owners of land bounded on a harbor, own only to high-water mark. It is true they have a right to construct wharves upon the soil below that line if they conform to such regulations as the state shall see fit to impose upon them and do not obstruct the paramount right of navigation. From their land bounding upon the shore they hold the exclusive right to embark and go upon the sea, for the reason that no other person can enter upon their land for embarkation or for any other purpose without their permission; but every person has the superior right to navigate the waters opposite thereto without obstruction from any structure erected by them.

The duty of protecting this dominant right rests upon the legislature; and they are to determine for themselves by what methods and instrumentalities they will discharge it. It is plain that they themselves cannot descend to the making of frequent examinations into the situation of each riparian proprietor upon our extended coast. There is no bar in reason, and none in the constitution, to the vesting in commissioners appointed by themselves the power to restrain such proprietors from extending structures into navigable waters; they part with no legislative power; they enact the law; the commissioners by the aid of the courts enforce it. Besides, this mode of performing the service which the legislature owes to the commerce of the world has so often received both

legislative and judicial sanction in other jurisdictions that it is now quite too late to challenge it.

The enactment of the law is in no sense an exercise of the right of eminent domain; it is not that taking of private property for public use for which compensation is to be made. The public do not propose in any manner to appropriate or use any right of the respondents in the soil of the shore, but only to guard against any invasion by them of the paramount right of the public to navigate the waters over it; to enforce against them the maxim—*sic utere tuo ut alienum non lædas*. It is only the exercise of the police or supervisory power vested in the legislature—the power to enact such laws as they deem reasonable and necessary for the regulation of the use by riparian proprietors of their qualified right to the soil of the shore. Indeed no individual is the absolute owner of any land in so high a sense as that he can set the legislature at defiance as to the use he may make of it; as part of the price to be paid for the privilege of living under law he subjects himself to certain restrictions for the public good; to limitation upon the profitable use of his property for the promotion of the general welfare. The prohibitions against wooden buildings, powder magazines and slaughter-houses in cities, are common instances of this.

The shore line is irregular, broken by alternate indentations and projections, and the deep water channel is at every possible angle with, and at varying distances from it. The unrestrained desire of proprietors to build first and farthest leads them to invade and obstruct the channel. Hence the occasion for legislative interference for the preservation of the acknowledged right of all vessels to access to all wharves. Neither in its provisions nor in its mode of execution is the act in violation of any of the fundamental principles of the social compact; on the contrary its effect is greatly for the wealth and peace of the public. The manner of its enforcement is open and fair. The respondents first advised the commissioners specifically of their plans; this opened the door for a hearing; after hearing and consideration the latter advised them that the proposed structure would obstruct the public

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right of navigation. Here was a day in court; a day before a tribunal presumably impartial and specially qualified to determine the precise matter entrusted to them.

Nor does the law become partial and individual in its scope and operation for the reason that the commissioners are clothed with power to limit the extent to which any proprietor may reach out from his shore line towards or into navigable waters, and that it therefore will result that *A*, *B* and *C* will be permitted to build wharves of different lengths. The location of the land of each, the configuration of his shore line, the relative position of the channel, and the outline of the whole harbor as it bears upon his particular case, are all to be taken into consideration and weighed by the commissioners; they are to determine the largest measure of use of his right to the shore which each can enjoy consistently with the greatest benefit to the public. And this general rule is to be applied alike to the respondents and all other owners; each is to surrender precisely what is necessary to prevent his wharf from being an obstruction. Therefore so far as the law and the reason of its being are concerned the surrender by each is precisely the same.

We are to take notice that the wharves in New Haven harbor have now become numerous and valuable; that the effort to extend them has invited public attention and legislative interference; that the act in question is an exception to the ordinary rule by which laws operate only after the adjournment of the legislature enacting them, and is made to take effect upon its passage. From these facts we are to infer that, so far forth as its protecting power is concerned, it was intended for immediate effect; and this is the interpretation to be put upon it. We regard the establishment of a harbor line as a matter quite apart from the duty of the commissioners to take the harbor at once into their keeping. The existence of such a line spanning the whole harbor is not at all necessary to the exercise of their restraining power over a structure immediately to be built. The high and low water lines, and the course of the channel being known, they have all necessary data for action in reference to each case as it arises.

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But, if in their opinion the public right of navigation could be more perfectly protected and the conflicting claims of proprietors more satisfactorily adjusted by the immediate establishment of a line for the whole harbor, in advance of any intention to build wharves, they are authorized to advise the legislature as to the course which in their judgment such a line should follow; but it is obvious that its highest usefulness could only be secured by the immediate exercise of the power to hold all proprietors in check until there is opportunity for legislative action. So far as the erection of any proposed wharf is concerned they must act at once; so far as this general line is concerned they may act at once or never.

By section 1, title 22, page 551, of the revision of 1875, it is enacted as follows: "All public laws, not contained in the foregoing titles, except acts of incorporation, confirming acts, acts which though public in form are of a private nature, and all public laws except such as by particular provision and this title are continued in force, are repealed."

The respondents urge that the act in question is public both in form and nature and therefore is not saved by any of the foregoing exceptions.

After the close of each session of the legislature the secretary of the state has given notice to the public of the acts passed by publishing a part of them in one pamphlet as "public acts," and a part in another pamphlet as "private acts and resolutions." The act before us, passed in 1872, was published in the pamphlet of private acts and resolutions for that year. This classification, it is true, was that of the secretary and not of the legislature; but there the public found it, and overlooking the distinctions between acts public in form but of a private nature, and acts public in form but of a special nature, came to regard and speak of this as private; and presumably the legislature of 1875, the members of which were of this public, intended to include it in, and save it under the description of, "acts which though public in form are of a private nature." Indeed the same legislature, in section 19, page 438, of the revision of 1875, provided that "the private or special acts of this state shall be legal

evidence, and the courts shall take judicial notice of them;" seeming to use the terms "private" and "special" as having the same general signification.

The legislature of 1869 had passed an act entitled "an act to prevent and remove nuisances and obstructions from the channel of Mill River." This channel is a part of the harbor of New Haven, and the act is essentially of the same nature as the one in question; but the same secretary saw fit to publish it in the pamphlet of public acts for that year, and there the public found it, and, still disregarding distinctions, had come to regard this as a public act. But the legislature of 1875 declares that though public in form it is either local or private in its nature, and in the sixth section protects it by special mention from any assertion even that the general words, "all public laws," in the first section had repealed it. The act in question, that of 1872, never having been printed with the public acts, and always having been regarded as private in nature, stood in no need of such mention for its protection. The legislature recognizing the fact that the general understanding as to what laws are public and what are private is mainly the result of the official declarations made by the secretary from year to year, adapted certain expressions both in the first and in the sixth sections to this popular idea.

We think that the act in question has not been repealed.

We advise the Superior Court to grant the injunction.

In this opinion the other judges concurred.



JOHN W. STEDMAN, INSURANCE COMMISSIONER, vs. THE
AMERICAN MUTUAL LIFE INSURANCE COMPANY.

By statute the insurance commissioner, on finding that the assets of any life insurance company of this state are less than three-fourths of its liabilities, is to apply to the Superior Court for the appointment of a receiver and the
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annulling of its charter. Held to be no answer to a petition for this purpose that the respondents had, by legislative permission, transferred all their assets to another company, which had assumed all their liabilities, so long as the holders of their policies had not assented to the arrangement.

A petition in equity was reserved for the advice of this court upon a demurrer of the petitioner to the respondents' answer and a demurrer of the respondents to the replication of the petitioner. Held that in these circumstances the counsel for the petitioner should go forward in the argument.

PETITION by the Insurance Commissioner of the state for the appointment of a receiver of the assets of a life insurance company, and for an injunction against its further prosecution of business and an annulling of its charter; brought under the act of 1875, (Session Laws of 1875, p. 12,) to the Superior Court in New Haven County. The respondents filed an answer, to which the petitioner replied and demurred; and the respondents demurred to the replication. Upon these pleadings the case was reserved for the advice of this court. The case is fully stated in the opinion.

Upon the case coming up for argument in this court a question was made as to which party should go forward in the argument, as each party stood upon a demurrer to the other's pleadings. The judges decided that in the circumstances the counsel for the petitioner should go forward.

S. E. Baldwin, for the petitioner.

T. E. Doolittle and *A. H. Robertson*, for the respondents.

PARDEE, J. In 1847 the respondents were authorized to issue policies of insurance upon lives upon the mutual system, in 1850 to exercise the powers of a trust company, and in 1854 to act as guardian, trustee, or receiver, without giving bonds, when appointed by any court. In 1873 by legislative permission they transferred all of their assets to the American National Life Insurance Company, which last company then assumed all of the liabilities of the first. The transfers of assets included securities of the value of \$100,000, theretofore deposited by the respondents, upon requirement of law, with the state treasurer, for the protection of their policy-holders.

A public act, (Session Laws of 1875, chap. 20, page 12,)

provides that if the insurance commissioner shall at any time find that the assets of any life insurance company incorporated by this state are less than three-fourths of its liabilities, he shall ask the court to appoint a receiver and annul its charter; that the court shall appoint a receiver if upon hearing such deficiency shall be found to exist; and that the net present value of the policies, or re-insurance reserve ascertained as now required by law, shall be considered as a liability.

Upon this act the insurance commissioner has brought this petition. In it he alleges, substantially, that on or about September 1st, 1877, he found from examinations and otherwise that the assets of the respondent corporation were less than three-fourths of its liabilities; that this deficiency still continues; that the company has failed to comply with the requirements of law, in this, that it made no such annual report to the insurance commissioner, as is required by law, for the year 1875; and no complete report, such as is required by law, for the year 1876; nor any lawful report, or any report in its own name whatever, during the last three years, to the insurance commissioner; and that, on the 19th day of October, 1877, he notified the company to cease to issue new policies, or pay dividends to stockholders or policy-holders, until the deficiency between its assets and liabilities was made good, and the law complied with; and he asks for the appointment of a receiver, a revocation of the charter, and a temporary injunction against the transaction of business.

To this petition the respondents filed a plea, in which it is alleged, substantially, that before the date of the petition the legislature, with a view of enabling the respondents to re-insure all their policies in the American National Life Insurance Company, and with a design to aid them in effecting such re-insurance, and in the transfer of all their assets to said company, on the 3d day of July, 1867, passed an act authorizing the board of trustees of the American Mutual Life Insurance Company to loan to the individual members of the board the amount required to pay for the capital stock of the American National Life Insurance Company, which should be subscribed for by such individual members; and that before

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that time, to wit, in May, 1866, the legislature had incorporated the American National Life Insurance Company with a view to its taking the assets and assuming the liabilities and business of the American Mutual Life Insurance Company, its corporators being the trustees of the latter company, and that in 1871 an act was passed by the General Assembly changing the name of the American National Life Insurance Company to that of the American National Life & Trust Company, and for the express purpose of authorizing the state treasurer to surrender to the American National Life & Trust Company the securities belonging to the American Mutual Life Insurance Company, to the amount of \$100,000, being the amount deposited with the state treasurer by the last named company in accordance with the law, whenever the American National Life & Trust Company had deposited with the treasurer a like amount of securities, so that, in the language of the act, "the liabilities of the American Mutual Life Insurance Company may be assumed by the American National Life & Trust Company, as may be provided between said companies;" and that afterwards, on the 15th of April, 1873, the respondents, in consideration of the assumption of their entire liabilities by the latter company, transferred to that company their entire assets, the transfer to take effect on the first day of January, 1873, and the state treasurer surrendered to that company all of the securities of the respondents in his possession; and that the insurance commissioner on the 18th of April, 1873, as by law required, made an examination of the condition of the American National Life & Trust Company, and found that it had complied with the conditions of its charter, and was duly organized, and that the arrangement with the American Mutual Life Insurance Company and the respondents had been made in strict compliance with the provisions of law, and that the statement of the condition of the company filed in his office was correct; and thereupon, on the 18th day of April, 1873, he issued to the American National Life & Trust Company a license, authorizing it to issue policies and transact business, and in further compliance with his duty reported all the above facts

to the legislature at its May session, 1874; and that the respondents after the assumption of all their liabilities by, and the transfer of their assets to, the American National Life & Trust Company, had done no business whatever, and did not intend to do any, and that there had been from that time a complete non-use of all corporate power, privileges and franchises; and that the legislature at its May session, 1875, recognized and confirmed the transfer of their assets to the American National Life & Trust Company, and the fact that they had ceased business, and that the last named company had assumed all their liabilities.

The petitioner replies substantially that he ought not to be precluded from maintaining his petition by anything contained in the plea, for the reason that, before the date of the transfer therein mentioned, the respondents had issued a large number of policies of insurance upon lives, payment upon which is not to be made until the expiration of those lives respectively; and that many of the insured are living, and many of the policies are now in force. This replication is demurred to by the respondents. The petitioner also demurs to the plea of the respondents.

The replication is sufficient. During many years the respondents exercised the franchise conferred upon them and assumed contract obligations to many policy-holders, some of which were in force when, in 1873, they transferred their assets to the American Life & Trust Company, upon the assumption by the latter of their liabilities. And the record does not disclose that individuals holding policies issued by the respondents were parties to this transfer, or that their rights were in any degree affected by it. The allegations in the petition are that there are existing liabilities, that is, that certain holders of policies have done every act and fulfilled every obligation requisite to the preservation of legal claims upon the respondents; and that these greatly exceed their assets; and it is not an answer to say that another corporation has promised to protect the respondents from these liabilities; the value of the guaranty remains wholly undetermined. There is then a life insurance company in possession

of a franchise having liabilities in excess of assets. Herein are the requisite conditions for the operation of the statute, and the court is not excused from obedience to it by the allegation in the plea as to the want of assets. There must be an enquiry as to the truth of the averments in the petition.

We hold the replication to be sufficient, and the plea demurred to insufficient.

In this opinion the other judges concurred.



BENJAMIN NOYES vs. JOHN C. BYXBEE.

45	382
64	235
45	382
66	33
45	382
67	372

The power of a committee or public officer to commit for a contempt, where authorized by an act of the legislature to summon witnesses and examine them under oath, should not be left to implication, but should clearly appear on the face of the act.

The power given by statute to the insurance commissioner to investigate the financial condition of any life insurance company of the state, to summon its officers before him, to compel their attendance and the production of papers, and to examine them under oath, does not authorize him to commit for contempt in refusing to be sworn and to answer questions.

HABEAS CORPUS, in the Court of Common Pleas of New Haven County.

The court issued the writ upon the application of the plaintiff, who alleged that he was held in custody by the defendant. The defendant, who was sheriff of New Haven County and keeper of its jail, made the following return to the writ:—

In obedience to the foregoing writ I have the body of the said Benjamin Noyes here before the court, and, for the cause of his detention by me, I state that on the 30th day of October, 1877, John W. Stedman, Insurance Commissioner of the state, at said New Haven, signed and issued and delivered to me as the sheriff of said county, for service, a certain warrant in the words and figures following, to wit:—To the sheriff of New Haven County, or his deputy, *Greeting:—* Whereas I, John W. Stedman, Insurance Commissioner of

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the state of Connecticut, did, on the 30th day of October, 1877, sign and issue a subpœna directed to Benjamin Noyes of said town, summoning him by virtue of a certain act entitled an act conferring additional power upon the insurance commissioner of the state, approved March 22d, 1877, to appear before me at the office of the State Attorney, in the court house at said city of New Haven, at two o'clock in the afternoon of said 30th day of October, then and there to testify and be examined under oath in reference to the condition and affairs and management of two certain corporations chartered by said state, by the respective names of the American Mutual Life Insurance Company of New Haven, and the American National Life & Trust Company of New Haven; and whereas said summons was duly served by John C. Byxbee, sheriff of said New Haven County; and whereas the sum of seventy cents was paid to said Noyes for his travel to and attendance before me by said officer who summoned him; and whereas said witness did not appear at said time and place, though duly called; and whereas I did thereupon, on said 30th day of October, 1877, sign and issue a *capias* commanding the sheriff of New Haven County, or his deputy, by authority of the State of Connecticut, to arrest the body of said Benjamin Noyes and him forthwith have before me at said State Attorney's office, to testify and be examined under oath touching the matters aforesaid, pursuant to said statute in such case made and provided, and be dealt with according to law; and whereas, by virtue of said *capias*, the body of said Noyes was duly arrested by Joseph H. Keefe, a deputy sheriff for said New Haven County, and by virtue thereof I now, on this 30th day of October, 1877, have him, the said Benjamin Noyes, before me; and whereas he has wilfully and contemptuously declined to be sworn and to answer my questions, and disclose the financial condition, affairs and management of said life insurance companies or either of them; and whereas he has declined to purge himself of contempt by answering any inquiries in reference to said companies or either of them:—These are therefore by authority of the State of Connecticut and of the act hereinbefore referred to,

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to command you that you take and commit the said Benjamin Noyes to the keeper of the common jail in said town of New Haven; and the keeper of said jail is hereby ordered to receive the said Benjamin Noyes, and him safely keep within said jail until he permit himself to be sworn, and answer my questions, and disclose concerning the financial condition, affairs and management of said life insurance companies, and purge himself of contempt, and be discharged by due process of law. Hereof fail not, but make due service and return. Dated at New Haven, this 30th day of October, 1877. JOHN W. STEDMAN, *Insurance Commissioner*. And I further certify that pursuant to the above recited warrant I did on said day and year at said New Haven take the body of said Benjamin Noyes, for the purpose of committing him to the jail of said county, agreeably to the precept of said warrant; but that, before making such commitment, said writ of habeas corpus was served upon me; whereupon I did not commit said Benjamin Noyes to said jail, but produce him here before this court, and assign the premises as the cause of his said detention, and imprisonment.

JOHN C. BYXBEE,
Sheriff of New Haven County.

To this return the plaintiff demurred, and the case was reserved upon the demurrer for the advice of this court.

T. E. Doolittle, with whom was *A. H. Robertson*, in support of the demurrer.

S. E. Baldwin and *W. K. Townsend*, contra.

PARK, C. J. The authority under which the insurance commissioner assumed to act in committing the plaintiff for contempt in refusing to be sworn and to answer questions with regard to the financial condition and management of certain life insurance companies, is to be found in the act of 1877, the part of which, important to the present case, is as follows: "The insurance commissioner may at any time investigate the financial condition, affairs and management of any life insurance company incorporated by, or doing business

in this state, and may require any such company to produce, and may examine, all its assets, records, contracts, books and papers; may compel the attendance before him, and may examine under oath, its directors, officers, agents, or any other person in reference to its condition, affairs and management, or any matter relating thereto; may administer oaths, and shall have the same power to summon and compel the attendance of witnesses, and to require and compel the production of records, books, papers, contracts, or other documents, as is now possessed by the Superior Court."

The commissioner under this act has express authority to administer oaths, and compel the attendance of witnesses, and the production of records, books, papers, and other documents, and his power in this respect is equal to that of the Superior Court. But this power became exhausted when the plaintiff obeyed his summons by appearing in due time before him. The commissioner has power to investigate the financial condition and management of any life insurance company doing business in the state, and to examine under oath its directors, officers, and agents, or any other person in reference to its condition and management. But there is no direct authority conferred upon him to commit any person to jail for refusing to be sworn and answer his questions. Indeed the word "contempt" is not found in the statute. This word is almost invariably used when power is conferred upon any court, judge, or other magistrate to punish for contempt. When a special commission was recently appointed to investigate the affairs and management of the life insurance companies of the state, special power was conferred upon the commissioners to punish for contempt. The words of the resolution were—"they shall have the same power as the Superior Court in the punishment of any witness for contempt." Generally moral influence is deemed sufficient to command respect and obedience where the legislature grant authority to a commission to make such examinations. Bank commissioners have no power to commit for contempt, although they have authority to administer oaths in the discharge of their duties, and may examine any person under oath in relation to the

affairs of the banks under their supervision, with authority to compel the attendance of witnesses and the production of books and papers by suitable process. Railroad commissioners have no such power, although they may examine witnesses under oath as they may think proper in relation to the affairs of any railroad company. The state board of charities have no such power, although in the discharge of their duties they may examine witnesses under oath, and may send for persons and papers.

We think the granting of so great power to a commission or to a single commissioner should not be left in doubt, or be inferred from the duties to be performed, when it is so easy to confer it in express terms, if the legislature is disposed to grant it.

We advise judgment in favor of the plaintiff, and that he be discharged from imprisonment.

In this opinion the other judges concurred.



WILLIAM J. PRATT, TRUSTEE, vs. JONATHAN W. POND.

Where an execution is served upon chattels and is not returned, the levy is not invalidated.

It is otherwise with mesne process, which must be returned to sustain the legality of the proceedings had under it.

Questions of ownership of personal property are generally mere questions of fact.

But held that, in the present case, where a wife claimed to be the owner, and her title depended upon the validity, as against the creditors of the husband, of transactions between her husband and herself, the question was so much one of law that the court could review the conclusion of the court below upon a special finding of the facts.

TRESPASS for taking a horse, with a count in trover; brought to the Court of Common Pleas. The plaintiff sued as statutory trustee of the property of his wife. The defendant set up in defense a levy upon the horse, made by him as

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a constable, of an execution against the plaintiff personally. The court (*Stoddard, J.*) made a special finding of the facts and rendered judgment for the defendant. The plaintiff brought the record before this court by a motion in error. The case is fully stated in the opinion.

W. C. Robinson, for the plaintiff.

C. H. Fowler, for the defendant.

LOOMIS, J. This is an action of trespass and trover to recover the value of a horse belonging, as alleged, to Charlotte E. Pratt, and which was taken by the defendant as constable, by the levy of an execution in favor of one Holbrook against William J. Pratt, the husband of said Charlotte E.

It appears by the record that this case was before this court at its June term, 1877, and was then dismissed upon the ground that the record presented no question of law.

It was afterwards tried in the court below and decided in favor of the defendant, and comes again to this court upon a special finding of facts, and a motion in error filed by the plaintiff, predicated upon the following claims made by the plaintiff, all of which were overruled by the court.

1st. That the giving of the bill of sale of the horse by Clark to Mrs. Pratt, and the delivery of the horse to her on the 17th of April, 1872, as set forth in the finding of facts, vested the title to the horse in her, or in the plaintiff as her trustee, and that the plaintiff was entitled to recover of the defendant the value of the horse at the time it was taken, and interest.

2d. That upon the facts as found the consideration for the sale of the horse moved from Mrs. Pratt.

3d. That even if the consideration came from Mr. Pratt, the giving of the bill of sale to Mrs. Pratt by Clark, and the delivery of the horse to her, with the knowledge and concurrence of her husband, under the circumstances set forth in the finding of facts, constituted a valid gift to her from her husband.

4th. That the execution in *Holbrook v. Pratt*, issued on

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the 16th of October, 1874, was no justification to the officer, for the reason that it was not returned to court until January 21st, 1875.

Before the argument was heard upon the merits the counsel for the defendant made a motion to dismiss the case, upon the ground that no question of law was raised on the record and that this court could not review inferences of fact.

But as the fourth point, relative to the effect of delay in returning the execution, was a pure question of law, we denied the motion, and concluded to hear the argument upon the whole case.

The fourth point however was not urged in the argument for the plaintiff, and the claim was doubtless originally made in consequence of overlooking the distinction between mesne and final process, as to the necessity of a return.

In *Toby v. Reed*, 9 Conn., 216, HOSMER, C. J., in giving the opinion, said: "It is established law that mesne process must be returned, or that the arrest or attachment by virtue of it is tortious; the end of the proceeding being to compel the defendant to appear and answer the plaintiff. But if an execution is duly served on chattels, and is not returned, the proceeding is valid; for the plaintiff has obtained the effect of his suit, and nothing afterwards is to be done on his part."

Having found no error in this point, we were in doubt whether the remainder of the case raised any question of law for our consideration. If the court had found, as matter of fact, the ownership of the horse at the time in question, we could not revise the finding unless for some error in law, disclosed of record, that entered into this finding. But the court did not find by whom the horse was owned, as matter of fact. There is a special finding of facts upon which the parties, as matters of law, predicated their respective claims of title, and these questions were evidently disposed of as matters of law by the court.

In *Myers v. King*, 42 Maryland, 65, it was held that "what is a legal transfer of property is a question of law." In ordinary cases questions of ownership are doubtless mere questions of fact, but when the question, as here, is compli-

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cated by the relation and respective rights of husband and wife, and the validity of certain transactions or gifts between them is called in question by a creditor of the husband, we think there are involved some elements of law that will justify a review by this court.

We have indeed repeatedly and quite recently decided the question of a wife's title to property, upon special findings of facts presented substantially as in the case at bar. *Wheeler v. Wheeler*, 43 Conn., 503; *Sanford v. Atwood*, 44 Conn., 141.

The following is a condensed statement of the facts found by the court, re-arranged so as to present them in consecutive order.

Some twenty years ago Mr. Pratt purchased a lot of land to build thereon a dwelling-house for himself and wife; and put into it four hundred dollars borrowed from his wife at the time of their marriage, ten years before. He also paid some of his own money, but how much does not appear, and the deed was taken in the name of his wife alone. By mortgage of this land they borrowed four thousand dollars, which was used in erecting the house, the husband performing most of the labor himself, being a joiner and carpenter by trade. On these premises Mr. and Mrs. Pratt have resided for about twenty years. The mortgage is still outstanding. In the year 1870 Mr. Pratt contracted with one Hemingway to build a house and barn for three thousand dollars, and to take in payment a lot of land and a barn standing partly on the lot and partly on other land of Hemingway, valued at \$3,000. But in order to get the money to perform this contract, at the same time he arranged with his wife that Hemingway should convey the land and barn to her if she would raise the three thousand dollars required by mortgage of her land; which arrangement was carried into effect by all parties. In April, 1872, Mrs. Pratt by mortgage on the Hemingway lot raised two thousand dollars, which Mr. Pratt used in his business. Soon after this mortgage was executed Mr. Pratt contracted with one Clark to sell him the land without the barn for twenty-seven hundred dollars, two thousand to be paid by assuming the last mentioned mortgage, and \$700 by note to

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Mrs. Pratt, payable at bank ninety days after date. A few days after a further contract was made, by which the barn was to be included, and Clark was to pay for the same by giving a bill of sale of the horse, which is the subject of the present suit, to Mrs. Pratt. Mrs. Pratt was consulted, and acceded to all the arrangements with Clark, and all was carried into effect by giving the necessary deeds and bill of sale. The horse was delivered to her, and from that time, until it was taken by the defendant, she has used and claimed it as her horse. Mr. Pratt however used it occasionally in his business, and also other members of the family, but always as Mrs. Pratt's horse. The horse when taken by the defendant was upon the premises occupied by Mr. and Mrs. Pratt, and to which she had held the title for twenty years. The execution was levied on the horse in October, 1874, more than two years after the purchase by Mrs. Pratt.

In all these transactions no fraud is found, and no purpose to sequester or conceal the property of the husband in the name of the wife.

And there was not only no fraud in fact, but none in law; no retention of possession after the sale, no color even of ownership in Mr. Pratt on the faith of which credit was given to him.

At the time when the several arrangements were made when property was conveyed to the wife, it does not appear that Mr. Pratt was indebted to Holbrook, the execution creditor, or that the latter was in a position to assail any of these transfers as fraudulent. It does however appear that at the time of the levy Mr. Pratt was the owner of property not exempt from execution of sufficient value to have satisfied the execution, which was levied on the horse.

We conclude, therefore, that the giving of the bill of sale of the horse by Clark to Mrs. Pratt, and the delivery of the horse to her, under the circumstances stated in the finding of facts, vested the title in her, and that judgment should have been given for the plaintiff; and that in overruling the claims of the plaintiff in this regard there was error.

In this opinion the other judges concurred.

CHARTER OAK BANK vs. DANIEL O. REED.

By the charter of the city of New Haven the jurisdiction of the City Court is made to depend upon the fact that one of the parties "resides" in the city. Held that by the term "resides" is meant that continuous and voluntary abiding which constitutes lawful residence, as distinguished from that which is temporary.

Held therefore that, where a person boarded in the city during the winter months, but lived in another town during the summer, being an inhabitant and voter in the latter place, and intending to remain only temporarily in the city, he did not reside in the city within the meaning of the charter.

A suit was brought to the City Court against *R*, the writ describing him as residing in the city, and was continued for four terms, when it was assigned for trial on the general issue. Before the trial, however, *R*'s counsel, having then for the first time ascertained the fact that he did not reside in the city, with the leave of the court filed a plea to the jurisdiction on that ground, which plea the court sustained, and dismissed the case for want of jurisdiction. Held to be no error. (Two judges dissenting.)

ASSUMPSIT, brought to the City Court of the city of New Haven.

The case was brought to the June term of the court in 1877, and entered upon the docket; the defendant appeared by his attorney and the case came by legal continuances from the June term, through the July, August, September and October terms, to the November term of the court, and at all of these terms the plaintiff and defendant both appeared by their respective attorneys.

On the 19th day of November the defendant's attorney handed to the plaintiff's attorney his plea, which was the general issue, with several notices under the statute, and the cause was assigned for trial on that plea, and the parties were present with counsel and witnesses ready for trial at the time assigned for trial. On that day the defendant's attorney, for the first time learned the facts relative to the defendant's residence, and asked leave to file a plea in abatement, to the jurisdiction of the court; the plaintiff objected, but the court overruled the objection, and allowed the defendant to file the plea. A hearing was had on the plea, and the court found the following facts:

Charter Oak Bank v. Reed.

The parents of the defendant reside in the town of Simsbury, in this state. About seven years ago he came from that town to New Haven, and was employed by his brother, then and ever since a merchant in New Haven, as clerk and traveling salesman. A part of the time while so engaged, the defendant, when in New Haven, made his home at his brother's house, but was away from the city most of the time.

About four years ago the defendant was married to a woman whose home was in Danbury, in this state, and with his wife came to New Haven, and has boarded in the city during the winter season of every year since, being at the house of his brother for several winter months in each year previous to the last year. In November, 1876, he came to New Haven with his wife, and took board with his brother, and remained at his house till about six weeks before the commencement of the present suit, when, with his wife, he went to the house of John W. Lake in New Haven to board, and boarded there up to the time the suit was brought, on the 25th day of May, 1877. During all said time the defendant was pursuing his business as traveling salesman. He became a partner in the business with his brother about two years before the suit was commenced, and continued in the partnership up to the time the suit was brought. During the last four years the defendant and his wife had lived in the summer at the house of his father in Simsbury, except when the wife has visited her father in the town of Danbury.

Upon attaining his majority the defendant was made an elector of this state in the town of Simsbury, and voted there at the last state election, and has always had and intended to keep his legal residence in that town, for the purpose of exercising the privileges of an elector there.

Upon these facts the court (*Peck, J.*) sustained the plea to the jurisdiction and rendered judgment for the defendant.

The plaintiffs filed a motion in error and brought the record before this court.

C. H. Fowler, for the plaintiffs.

1. The plea in abatement comes too late, the cause having

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been continued several terms. The defendant appearing at each term has waived his right to file a plea in abatement. New Haven City Charter, sec. 61; *Post v. Williams*, 38 Conn., 154; *State v. Tuller*, 34 id., 281; *Carpentier v. Minturn*, 65 Barb., 298.

2. The defendant resided in New Haven, within the meaning of the charter. Charter, secs. 1, 55; Webster's Dict. *Reside*; Bouvier Law Dict. *Residence*; *Lewis v. Hull*, 39 Conn., 118. Residence means "one's home at the time." *Easterly v. Goodwin*, 35 Conn., 285; *Waterbury v. Bethany*, 18 id., 430.

3. One's domicile and voting residence may be in one place, and his actual residence in another. *Easterly v. Goodwin*, 35 Conn., 285; *Colchester v. East Lyme*, 18 id., 431; *Reading v. Westport*, 19 id., 565; *Salem v. Lyme*, 29 id., 80; *Mandeville v. Huston*, 15 Louis. Ann., 281.

4. Actual residence within the jurisdiction of the court is sufficient though the domicile be in another jurisdiction. *Sears v. Terry*, 26 Conn., 273; *Mayor &c. of N. York v. Genet*, 4 Hun, 487; *Chariton County v. Moberly*, 59 Misso., 238; *Darst v. Bates*, 51 Ill., 439; *Way v. Way*, 64 id., 406; *Board of Supervisors v. Davenport*, 40 id., 197; *Pooler v. Maples*, 1 Wend., 65; *Bartlett v. Mayor &c. of N. York*, 5 Sandf., 44; *Frost v. Brisbin*, 19 Wend., 11; *Commonwealth v. Kelleher*, 115 Mass., 103; *Alston v. Newcomer*, 42 Miss., 186; *Davison v. Marchioness of Hastings*, 2 Keen, 509; *Thomas v. Earl of Jersey*, 2 Mylne & Keen, 398; *Summerville v. Summerville*, 5 Ves., 786.

L. N. Blydenburgh, for the defendant.

1. The filing of the plea to the jurisdiction was a matter entirely within the discretion of the court. *Olmstead's Appeal from Probate*, 43 Conn., 114; *Wildman v. Rider*, 23 id., 176; *Hotchkiss v. Hoy*, 41 id., 568. The City Court has a limited jurisdiction; no waiver of the parties could confer jurisdiction. And it was bound to dismiss the cause as soon as the want of jurisdiction was brought to its knowledge. New Haven City Charter, secs. 54, 55; *Olmstead's Appeal*

from *Probate*, 43 Conn., 111; *First Nat. Bank v. Balcom*, 35 id., 351; *Wildman v. Rider*, 23 id., 176; *Sears v. Terry*, 26 id., 278; *Huntington v. Birch*, 12 id., 151; Gould's Pl., 218.

2. This court can not review the finding of the City Court as to the residence of the defendant. But if it can, the conclusion of the court below is correct. The City Court is a local court of limited jurisdiction. Revision of 1866, p. 245; New Haven City Charter, secs. 54, 55. The word *resides* means lawful residence, and not temporary; otherwise the word is useless in the charter, as there would then be no distinction between the jurisdiction of the City Court and courts of general jurisdiction. If the residence is temporary, the time it continues is not important, whether a day or month. *Waterbury v. Bethany*, 18 Conn., 424; *Colchester v. East Lyme*, id., 483; *Grant v. Dalliber*, 11 id., 238; *U. States v. Noyes*, 4 id., 343; *Easterly v. Goodwin*, 35 id., 286; *Sears v. Terry*, 26 id., 280; *Salem v. Lyme*, 29 id., 80; *First Nat. Bank v. Balcom*, 35 id., 351.

LOOMIS, J. This cause was brought to the City Court of the city of New Haven, and after being continued for four successive terms came to the November term, 1877, where it was assigned for trial on the plea of the general issue; but before trial the defendant's counsel, having then for the first time ascertained the facts relative to his client's residence, asked leave of the court to file a plea in abatement for want of jurisdiction of the cause. The court, against the objection of the plaintiff, allowed the plea to be filed, and a trial was had thereon, which resulted in the sustaining of the plea and the dismissal of the cause for want of jurisdiction. The question is, whether this decision of the court was erroneous?

There is no doubt that the City Court is a local court of limited jurisdiction. By the fifty-fifth section of the charter of the city of New Haven the jurisdiction of this court over all civil causes at law and in equity is expressly made to depend on the fact that one of the parties resides in the city.

The court made a special finding of the facts, and one of the questions raised by the plaintiff's motion is, that the facts

thus found and made a part of the record constituted the defendant in law a resident of New Haven, within the meaning of the charter.

By the finding it appears that the defendant was a partner in business with his brother in New Haven, but most of the time was away from the city, acting as traveling salesman for the firm. For the past four years, during the winter months of each year, he with his wife had boarded in the city, and was so boarding at the commencement of this suit; but during the summer months of each of these years they had lived in the house of his father in Simsbury, in Hartford County; and the finding concludes as follows:—"Upon attaining his majority the defendant was made an elector of this state, in the town of Simsbury, where his parents reside, and voted there at the last state election, and has always had and intended to keep his legal residence in the town of Simsbury, for the purpose of exercising the privilege of an elector in that town."

The finding does not explicitly affirm the truth of the allegations of the plea, but as residence is mainly a question of intent, and the intent of the defendant to keep his legal residence in Simsbury is expressly found, we think it is equivalent to finding the residence in Simsbury; which, being matter of fact, is not the subject of revision by this court. If however, as claimed, the court misconstrued the charter as to the nature of the residence required, it would involve a question of law.

The plaintiff claims that by the charter a mere temporary residence, as a boarder, is sufficient to confer jurisdiction. We cannot accept this as the true meaning of the charter.

If the residence is temporary, its nature remains the same, whether it is continued for a year or a day. If, therefore, we adopt the plaintiffs' meaning of the word, there would be no distinction between the jurisdiction of the City Court and courts of general jurisdiction. This surely could not have been contemplated by the legislature when they created this local court. The word "resides" must refer to that continuous and voluntary abiding which constitutes lawful residence, as distinguished from that which is temporary.

The remaining question is, whether the court erred in receiving the plea to the jurisdiction, under the circumstances detailed, which involves the question whether the appearance of the defendant and the filing of the plea of the general issue was a waiver of his right to object to the jurisdiction; and whether the court had power, discretionary or otherwise, to receive the plea.

That the entertaining of the plea to the jurisdiction was fully within the discretion of the court is abundantly sustained by the cases of *Wildman v. Rider*, 23 Conn., 172, and *Olmstead's Appeal from Probate*, 43 Conn., 110.

The first mentioned case was originally tried before a justice on the general issue and decided for the plaintiff. The defendant then appealed to the County Court, where on the same issue he obtained a verdict in his favor. The plaintiff then appealed the case to the Superior Court, and there moved to erase the case on the ground that it was not appealable from the jurisdiction of the justice of the peace. The court refused to erase the case, and after trial on its merits gave judgment for the defendant. The plaintiff then by writ of error brought the record before this court, where it was held that the case was not within the appellate jurisdiction of either the County or the Superior Court, and that there was no waiver of the objection. WAITE, J., in giving the opinion said: "It was the duty of the court to dismiss the case whenever it discovered that it had no jurisdiction over it, and it was immaterial by whom a knowledge of that fact was communicated."

It is equally clear from the above and numerous other authorities that might be cited, that there was not, and could not have been, any waiver on the part of the defendant to affect the question. *State v. Richmond*, 26 N. Hamp., 232; *Damp v. Town of Dane*, 29 Wis., 419.

It is a fundamental principle that jurisdiction of the subject matter is never conferred by consent, it must come from the law.

There was no error in the judgment complained of.

In this opinion PARK, C. J., and PARDEE, J. concurred.

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CARPENTER, J. A plea in abatement was necessary in order to raise the question of jurisdiction. I think that plea was filed too late.

The defendant was described in the writ as a resident of New Haven, and as such service was made on him. He appeared in court, pleaded to the merits, and the cause was reached for trial. I think he thereby waived the objection and conclusively admitted, for the purposes of this case, that his residence was in New Haven.

In this opinion GRANGER, J. concurred.



LEOPOLD C. ZALESKI vs. ELIZABETH S. CLARK.

A "new trial" granted upon motion for error upon a former trial, means a new trial of the issue of fact before tried.

Where an issue of fact was tried by the court, and a special finding of facts made, and upon the facts so found the court as a conclusion of law rendered judgment for one of the parties, and the other party moved for a new trial for error in the conclusion of the court, and a new trial was granted without qualification, it was held that there should be a new trial of the facts before found.

But the court had power, in granting the new trial, to limit it to the conclusion of the court as to the law upon the facts, without disturbing the finding of facts.

The power to grant new trials is not dependent upon statute, but is incidental to courts of common law.

Whether where the facts are found, and the judgment of the court is only a conclusion of law upon the facts so found, the proper mode of carrying the case up for revision by the Supreme Court is not by motion in error or writ of error.—Note, p. 405.

ASSUMPSIT to recover the price of a plaster bust made for the defendant; being the same case in which this court granted a new trial, *ante* Vol. 44, p. 218. The case came again before the Court of Common Pleas, and was tried to the court upon the former plea of the general issue, before *Peck, J.* There had been a special finding of the facts by the court

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upon the former trial, which is given in full in the former report of the case.

Upon the second trial the plaintiff's counsel offered one Thompson as a witness to prove that the plaster bust of the defendant's deceased husband, which he had made for her, was a correct copy of a certain photograph of the deceased, and that the workmanship of the bust was good. To this testimony the defendant's counsel objected, for the reason that on the former trial the facts proposed to be proved by the witness were in issue; that the parties were then fully heard in reference to them with their proofs, witnesses and counsel; and that after the hearing the court made a finding concerning them in writing, which was duly filed with the clerk of the court; and that the matters were therefore *res adjudicata* and could not be again, between the same parties, the subject matter of judicial inquiry; that both of the parties were, by reason of the finding, estopped upon this trial from offering any testimony concerning any of the facts contained in the finding. The counsel for the plaintiff then claimed that he was not estopped by the finding from offering testimony in regard to any and all the points covered by that finding, and that he proposed to try the case *de novo*, and in all respects as if there had been no previous trial and finding of facts. The court overruled the objection and admitted the evidence, and decided that the plaintiff should be permitted to go fully into all the facts involved in the case and try it *de novo*. To this ruling the defendant's counsel excepted.

The counsel for the plaintiff then examined the witness in regard to the character of the bust, as a good work of art and a good representation in plaster of the photograph. He also called and examined witnesses in regard to all the questions of fact upon which a finding had previously been made. To all this testimony the counsel for the defendant objected for the reasons before stated. The court overruled the objection, (the defendant excepting to the ruling,) and admitted the testimony.

The court having rendered judgment for the plaintiff the defendant moved for a new trial, for error in the above rulings of the court.

C. Ives, in support of the motion.

1. In *Woolf v. Chalker*, in 1862, (31 Conn., 124,) being an action at law, HINMAN, C. J., expressed great doubt whether the finding of facts in that case could be regarded strictly as any part of the record, because there was then no statute (as in equity) authorizing it. The legislature in 1864 remedied this defect, by a statute which is on page 444, of the revision of 1875, § 9.

2. Upon the first trial of this case, the court, pursuant to the terms of this statute, found specifically the facts, and as such they were made a part of the record, and thus became *res adjudicata*, as much so as if they had been found by a committee, or had been embodied in a decree in equity. *Munson v. Munson*, 30 Conn., 425.

3. This finding is a *judgment* of the court upon the facts therein contained; until reversed or set aside it imports absolute verity; to dispute it is to dispute the truth; it is conclusive upon the parties and their privies, and they are estopped from denying or questioning its truth. "The vocabulary of judges has been well nigh exhausted to supply [such an estoppel] with honorable and endearing titles." Freeman on Judgments, §§ 246, 247, 249, and authorities there cited.

4. The best interests of the parties litigant, the welfare of society and the true policy of the state, require that after the contestants have had a full and fair trial before a competent tribunal, and that tribunal has made a finding of the facts, which finding has become a matter of record, the parties shall not be permitted to afterwards contest again those facts. "Human life is not long enough to allow of matters once disposed of being brought under discussion again." "A party whose interests are placed in jeopardy by a trial, has a right to judicial immunity from the consequences of further trials involving the same issues." *Webb v. Rocky Hill*, 21 Conn., 474.

5. That degree of confidence in and respect for our courts which is essential for the public weal cannot be maintained if to-day a court is permitted to find facts diametrically opposed to those which the same court, upon precisely the same evidence, found yesterday.

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6. It makes no difference in this case that a new trial had been advised by the Supreme Court, for the new trial would only have been shortened and simplified to the extent that certain facts had already been found and made a part of the record. The plaintiff was now at liberty to prove other facts if he could; and, if he could not, the trial would have been on questions of law arising upon the facts which appeared of record.

T. C. Ingersoll, contra, cited Bouvier's Law Dict., "*Trial*" and "*New Trial*," 2 Graham & Wat. on New Trials, 32; *Hawkes v. Truesdell*, 99 Mass., 557; *State v. Behimer*, 20 Ohio S. R., 576; *Donahue v. Klassner*, 22 Mich., 254; *Brenner v. Coerber*, 42 Ill., 497; *Ryan v. Tomlinson*, 39 Cal., 639.

LOOMIS, J. When this case came before this court at a former term it came up on a special finding of the facts by the Court of Common Pleas, with a judgment rendered upon those facts in favor of the plaintiff; the defendant moving for a new trial on the ground that the court erred in applying the law to the facts so found; and this court advised that a new trial be granted on that ground.

When the case came up for re-trial in the Court of Common Pleas, the plaintiff proceeded to introduce his evidence, when the defendant's counsel objected to the evidence on the ground that the facts sought to be proved by it were the same facts on which evidence had been introduced on the former trial, and that the finding then made by the court was an adjudication upon these facts which was conclusive upon the parties. The court overruled the objection and allowed the plaintiff to proceed with his evidence in the same manner as if there had been no former trial and finding of facts.

The defendant contends that this ruling of the court was erroneous, and having had judgment rendered against him, now asks for a new trial.

It is obvious that the precise objection made by the defendant to the introduction of the plaintiff's evidence, namely, that the former finding was a conclusive adjudication between the

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parties, was not well taken, as, if that finding was set aside and the whole case opened by the order granting the new trial, there was no longer any finding to operate as an adjudication; while if the finding was not set aside and the whole case opened by that order, the plaintiff had no right whatever to proceed to a new trial of the whole case, and the objection should have been taken to his attempt so to proceed and not to the evidence which he offered when the trial was commenced. In other words, the question was wholly one of practice, not of evidence; the evidence offered being pertinent and admissible if the plaintiff had, as a matter of practice, the right under the order granting a new trial, to a full re-trial of his case; and no evidence whatever being admissible if he was not, as a matter of practice, entitled to such re-trial. The objection that ought to have been taken was thus a preliminary one and was necessarily a fundamental one in the case.

As however no objection has been made by the counsel for the plaintiff to the form in which the objection was taken in the court below, we will consider it as sufficient to raise the question whether the plaintiff, upon the granting of the new trial to the defendant, was entitled to a full new trial of all the facts as if no finding of facts had previously been made, or whether that finding was to stand and the order for a new trial was to extend only so far back as to cover the error upon which the new trial was granted.

The term "new trial" has been a familiar one to the profession in this state since our early colonial history, and had acquired a settled meaning in England before our ancestors came to this country. It is believed that it has always been used in the sense of a complete re-trial of a cause, except in certain instances of which we will speak hereafter. These new trials were always re-trials of the facts of a case, and the term "new trial" is defined by Bouvier in his Law Dictionary, as "a re-examination of an issue in fact." Previous to the year 1762 they were granted only by the General Assembly, upon petition of the aggrieved party. In that year a statute was passed giving to the Superior and County Courts

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power to grant new trials in cases tried before them, "for misleading, discovery of new evidence, or other reasonable cause," and from that date to the year 1807 new trials were obtained only on petitions to these courts, like those at present brought in such cases. The new trials thus granted, so far as we are able to learn, were new trials of the entire issue of fact made in the case, precisely as if there had been no former trial. Thus HOSMER, C. J., in *Lockwood v. Jones*, 7 Conn., 436, speaking of the effect of the granting of a petition for a new trial, says:—"The original suit is entered in the docket, and the first and only cause of action, on the first and only writ, is tried again at a subsequent day. By the operation of the new trial, [meaning evidently the order granting the new trial,] the cause, in contemplation of law, is precisely in the same condition as if no judgment had ever been rendered." In 1807, after the re-organization of the courts by the act of the previous year, and the establishment upon a new basis of the Supreme Court of Errors, which was now to consist of the nine judges of the Superior Court, the judges, under a statute authorizing them to establish rules of practice, adopted a rule that bills of exceptions should not thereafter be admitted, but that motions for new trials should be admitted in all cases in their place, to be filed within forty-eight hours after verdict and during the session of the court; and that the several circuit courts should, at their discretion, reserve such motions for new trials for the opinion of the nine judges. This is the first that we hear of motions for new trials as distinguished from petitions. See remark of HOSMER, C. J., to that effect, in *Magill v. Lyman*, 6 Conn., 63. These motions were intended only for cases of error in law, either in the rulings or charge of the court; the jury having been held, up to that time, to be the judges of the law as well as of the facts in all cases, and the judges having no power to correct their errors except by sending them out to a re-consideration of the case, which could be done but twice. In connection with the rules of practice before mentioned, the judges adopted another, to the effect that the judges should, in charging the jury, state to them the several points of law arising in the

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case, "and declare to them the opinion of the court thereon." Thus the law of the case was separated from the fact, and any error in the rulings or charge of the court could be presented for review by a motion for a new trial. From that time, while petitions for new trials for causes other than errors of law have still prevailed as before, errors of law have been constantly carried up by these motions. The difference between them has become more marked by the practice of reserving all motions for new trials for the advice of the Supreme Court of Errors, while petitions for new trials are still, as then, heard and decided by the court that originally tried the case. These reservations were, by the rule of 1807, left to the discretion of the judges holding the court in which the motion was filed, but the act of 1830 made it imperative on the judges to reserve all such motions. It should be observed, too, that these motions were allowed only in the Superior Court, the remedy in the County Courts being by appeal or writ of error to the Superior Court. Neither the Superior nor the County Courts were regarded as having power, upon a petition for a new trial, to consider errors of law, and it has recently been expressly decided that such questions can not be considered on such petitions. *Andersen v. The State*, 43 Conn., 514. In all the cases, however, in which new trials have been granted upon motions, it is believed that the new trial has been, like that granted upon petitions, a re-trial of the issue of fact, in the former trial of which the error intervened.

We remarked before, that the term "new trial" had always been regarded by the profession as meaning a complete re-trial of a cause, except in certain instances of which we were to speak. These instances are where the trial of fact in which the error intervened has been a trial not involving the main issue of fact in the case; as where a remonstrance to the acceptance of a report of a committee or auditors sets up certain facts, and the court on the trial of an issue on those facts makes erroneous rulings, that render the trial of the issue a mis-trial. There a new trial of only that part of the case involved in that issue is asked for in the motion and of course only the new trial asked for is granted. The new

trial is here, as everywhere, a new trial of the facts, and is in no sense a new trial of the law. The error of law has been tried upon the motion and has been decided by the court in deciding to grant the new trial. The new trial when granted is no longer a trial of the law, but solely of the fact.

While however an unqualified order granting a new trial would properly be taken to be an order for an entire new trial of whatever issue of fact was involved in the former mis-trial, we have no doubt of the power of the court to make a qualified order for a new trial, making it apply only to such part of a case as would admit of correction without an entire re-trial of the issue. The whole matter of new trials addresses itself largely to the discretion of the court, and that discretion we think extends to any qualification of its order that may be necessary to do justice to the parties. In *Bartholomew v. Clark*, 1 Conn., 472, SWIFT, C. J., says:—"To all courts acting on the principles of the common law the power is incidental to grant new trials for various causes;" and this common law power the courts must have the right to exercise in such a manner as shall best promote justice. We think therefore, that if a motion for a new trial was the appropriate remedy for an error like the one in the present case, the court would have had the right to limit the new trial that was granted to that part of the case into which the error entered, namely, the judgment of the court upon the facts found, and have excluded from its operation the finding of facts, which was complete in itself and free from all error, and in no manner disturbed by the subsequent error of the court in applying the law to the facts so found.

But as the new trial asked was of the whole issue of fact, and as the court granted a new trial without qualification, we think the whole issue of fact was opened for re-trial, and that the Court of Common Pleas committed no error in allowing the plaintiff to proceed to such trial of the facts, in the same manner as if there had been no former trial and no finding of facts.

A new trial is not advised.

In this opinion the other judges concurred.

NOTE.—Under our present practice there are four modes by which cases are brought before the Supreme Court of Errors, viz:—Writ of Error; Motion in Error; Motion for a New Trial; and Reservation for Advice.

1. *Writ of Error.* This is the common law mode of carrying up cases upon errors of law, and was formerly the only mode in this state. The errors reached by this proceeding are always those that are either apparent of themselves upon the record, or are brought into it by a bill of exceptions. Where a special finding of facts was made by the court, it was not regarded as a part of the record, unless made so by special order of the court. *Chambers v. Campbell*, 15 Conn., 427; *Nichols v. City of Bridgeport*, 27 Conn., 459, and remarks of STORRS, C. J., on page 467. But now, by the act of 1864, (Gen. Statutes, p. 444, sec. 9,) in all trials of issues of fact to the court, the judge is required, upon motion of either party, to make a finding of the facts upon which the judgment is rendered and cause the finding to become a part of the record. Questions of law arising upon such a finding could of course be revised on a writ of error. A writ of error lies only after final judgment in a case, and may be brought within three years from the rendering of the judgment.

2. *Motion in Error.* This proceeding is in its nature and operation precisely like a writ of error, differing from it only in the mode in which it is instituted. The writ of error is a separate suit, served like any other; the motion in error is filed in court at the same term in which the judgment is rendered, and is therefore a continuance of the proceeding already in court and not the commencement of a new suit. This is authorized wholly by statute. It lies in no cases where a writ of error would not have lain, unless it be expressly provided as the sole remedy by statute, as in the case of motions for judgment as upon a non-suit, (Gen. Statutes, tit. 19, ch. 13, sec. 4,) where the decision of the court refusing to set aside a non-suit may be reviewed upon a motion in error; in which case it would seem that a writ of error would not lie.

3. *Motion for a New Trial.* The allowance of these motions is incidental to all common law courts. Their nature is sufficiently explained in the foregoing case. They are addressed to the same court which tried the case, and are reserved for the advice of the Supreme Court. This reservation was originally informal and at the discretion of the judge of the Superior Court, but by the statute of 1830 was required in all cases. The Supreme Court does not order the new trial, but simply advises the Superior Court to grant or refuse it, and that court is required by law to conform to the advice. These motions were originally made only in the Superior Court, the remedy in the county and justice courts being wholly by appeal or writ of error; but now they may be made in the courts of common pleas and city courts, and reserved in the same way. Motions for new trials for ordinary errors are to be distinguished from motions for new trials on the ground of a verdict against evidence. These motions are by statute made directly to the Supreme Court itself, and do not come up like the others by reservation. The Supreme Court in this case grants or refuses the new trial, and does not advise the lower court to do it. The distinction between a motion for a new trial and a petition for a new trial is fully explained in the foregoing case. There is no very obvious reason why motions for new trials should not be allowed in equity proceedings where a case has been tried upon an issue of fact, but it has not been the practice to allow them. Now however, by the act of 1878, they may be allowed in equity proceedings as well as in actions at law.

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4. *Reservation for Advice.* The reservation of motions for new trials for the advice of the Supreme Court falls properly under this head—but it helps to a clearer classification to place them by themselves. The ordinary reservations are either (1st) upon a state of pleadings which presents a question of law for decision; or (2d) upon a statement of the facts of the case by the judge below. These reservations were originally informal, and were established as a part of our system only by practice. The judges of the Superior Court became, by the act of 1806, judges of the Supreme Court of Errors, and questions on which any judge wished the advice of his brethren were held by him for such advice—the advice when given not being authoritative. No statutory regulation appears on the subject until the act of 1835, which not merely authorized such reservations but made the advice given obligatory on the lower court. Previous to 1806 there is no reported case of a reservation, although the judges of the Superior Court had for some time before that date held their summer circuits together to hear cases of law. In the first volume of Day's Reports, covering the period from June, 1802, to June, 1804, there are sixty-four cases, all of which are writs of error. In the fifth volume, covering the period from June, 1811, to November, 1813, there are seventy-six cases, of which twenty-two were writs of error, forty-eight were motions for new trials, and six were on reservation. At the present time the cases that go up on reservation are not much less in number than those that are carried up on motions for new trials. The original theory of reservations was departed from, when the judges of the Superior Court ceased to be *ex-officio* judges of the Supreme Court, and still farther when, by recent statutes, reservations for advice were allowed to be made by the courts of common pleas and city courts. It retains however the same practical usefulness, and is one of the most convenient modes of taking the opinion of the Supreme Court upon the points of law in a case.

The mode adopted in the foregoing case in the first instance to obtain a revision of the rulings of the court below, was by a motion for a new trial. When brought up a second time it was by a like motion. The court upon the second motion was called upon to decide merely what was meant by the new trial granted upon the first motion, and the question did not arise whether a motion for a new trial was the proper mode in the first instance of bringing the case up. Having considered the motion without objection taken by either party and advised the new trial, there was no occasion, as the question did not arise on the second motion, of going back to a consideration of the question whether the first motion was a proper one. The practice has become so loose in respect to the form of carrying up cases by motions for a new trial, and the impression has been so general among the profession that almost any case could be carried up in that way, that it is very probable that the court would have held the proceeding a proper one. But a motion for a new trial in such a case is wholly out of harmony with the general principles governing proceedings in error.

The peculiarity of the case in question was, that the court had, upon a full trial, made a special finding of the facts, and then had on those facts held the law to be so that the plaintiff was entitled to recover. The finding of facts being a part of the record, it was clearly a case where a writ of error or motion in error would have lain. The error to be revised lay wholly in the conclusion of the court upon the facts found and not in any ruling of the court that had affected the finding.

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The finding must be regarded as standing on precisely the same ground with a special verdict or a report of auditors or of a committee. The conclusion of law upon the facts found is, it is true, so annexed to the statement of the facts as to seem to be a part of the finding. It is however properly no part of it, but is simply the application by the judge of the law to the facts, precisely as if those facts had been found by some other tribunal, and is open to review on a writ of error or motion in error precisely as it would have been if the facts had been so found.

While a writ of error or motion in error seems to be the appropriate remedy in such a case, a motion for a new trial seems to be an entirely inappropriate one. A new trial is the remedy for a mis-trial. But there has been no mis-trial, so far as the facts are concerned. No evidence was improperly admitted or excluded. There was no charge to the jury by which the law had become inextricably involved with the facts and materially affected the finding of them. In such cases there can be no correction of the error but by a wholly new trial of the issue of fact into which the error of law had entered. The very language of the act of 1830 regulating motions for new trials, shows that only errors that entered into the trials of issues of fact were intended to be reached by them. Its language is, "if either party shall think himself aggrieved by the decision of the court upon any question of law arising in such trial," &c. In *Church v. Syracuse Coal & Salt Company*, 32 Conn., 372, it is held that the power of the court to grant new trials is not derived from this statute, and that new trials may be granted for errors that preceded the actual trial, so long as they entered into it and made it a different thing from what it would have been but for the error, as, in that case, the improper allowance of an amendment of the declaration, by which the case tried to the jury was a different one from what it otherwise would have been. This case goes further than any previous one had gone in extending the application of the remedy by new trial to errors occurring before the trial commenced, and certainly goes to the verge of the law; but even in this case the court lays down the rule with great distinctness and force, that the error must be one that affected the trial and not one that was outside of it. BUTLER, J., giving the opinion of the court, remarks upon this point as follows (p. 374): "As a rule decisions upon interlocutory motions do not reach to and materially affect the character of the trial, and can only be reversed on error; and a motion for a new trial is never proper unless the trial has been in some material respect different from that which the party claiming to be aggrieved was legally entitled to, and would have had but for some erroneous decision of the court. But where such decision does reach to and affect the character of the trial, and a correction of the ruling will necessarily result in a new and different trial, there is no good reason why an application for a new trial should not be permitted."

Our courts have leaned in favor of motions for new trials where they could be made applicable, and against writs of error, for the reason that in the former the court could exercise its discretion and not in the latter. But this consideration does not apply to the case of a finding of facts by the court, and an erroneous application of the law to those facts. In such a case the conclusion of the court is, as a general rule, either wholly right or wholly wrong. There is no middle place between these extremes, and no room therefore for the exercise of discretion in the granting or refusing a new trial. The whole case is presented by the finding, and the judgment must necessarily be a simple judgment for the plain-

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tiff or for the defendant. If for either, and the judgment is right, there is no error and it stands. If wrong, there is error, and it is reversed. It is not a case where the court has erroneously admitted or excluded evidence and in which therefore the question may arise as to whether any injustice has been done by the error—but it is a case of a judgment that is rightly or wrongly given to the party in whose favor it is rendered, and the writ of error is issued for the purpose of determining which. It is true that there may be cases where a judgment is made up of wholly distinct items, and the court may have erred in allowing one of the items while otherwise correct. But it is well settled that a judgment which is erroneous in part only can be reversed for part and affirmed for the rest, if the legal and the erroneous parts can be separated. *Welles v. Fowler*, Kirby, 236; *Dixon v. Pierce*, 1 Root, 138; *Sherwood v. Sherwood*, 32 Conn., 2; *Bradshaw v. Callaghan*, 8 Johns., 558. But in the case of an entire and indivisible judgment, in which the question of law as to the judgment to be rendered rests wholly upon the facts found, and there is no question as to the rulings of the court upon evidence, the judgment must as a whole be right or wrong.

It seems to the writer therefore that where the facts of a case are found and made a part of the record, and the judgment rendered is only the conclusion of the court as to the law upon the facts so found, the proper mode, and only proper mode, of carrying up the case for revision by the Supreme Court is by a writ of error or motion in error.

R.

Legg v. Horn.

SUPREME COURT OF ERRORS.

COUNTIES OF HARTFORD, MIDDLESEX, AND TOLLAND.

JANUARY TERM, 1878.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS, AND GRANGER, JS.

JOHN LEGG AND WIFE vs. FREDERICK HORN.

C, owning two dwelling-houses upon adjoining lots, and having a right to the water from a spring upon land of another party for use at the houses, sold one of the houses to *L*. In the negotiation he had agreed that *L* should have one-half the water from the spring and that they should at their joint expense lay a pipe from the spring to a point near the houses, from which each should lay a pipe to his own house at his own expense. This agreement was not put into the deed, nor in writing, but it had a controlling influence in inducing *L* to purchase. The pipes were thus laid, at an expense to *L* of \$100. Afterwards *C* purchased the lot containing the spring, and some time after sold that lot with his dwelling-house to *H*, who bought with full knowledge of the agreement with *L* as to the water and pipes. After his purchase *H* demanded payment of *L* for the further use of the water, but *L* continued to take it as before, claiming the right to do so under the agreement with *C*. *H* forbade *L* to take water from the spring and finally cut the pipes on his own land. *L* had used the water under the agreement for more than fifteen years from the time of the purchase. Upon a petition for an injunction against *H*, it was held—

1. That the agreement of *C* with *L* was not a mere license, but that *L* acquired under it an equitable right.
2. That *L*, by his use of the water under a claim of right for fifteen years, had acquired a legal title to the easement.
3. That *L* had a right to enter upon the land of *H* to repair the pipes and put the spring in order.
4. That the remedy by action at law for damages was entirely inadequate, and a court of equity had jurisdiction.
5. That *H* should be enjoined, not only from doing any act that should prevent *L* from taking water from the spring, but from using the water in any manner that should deprive *L* of the use of one-half of it.

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PETITION for an injunction against interference by the respondent with the right of the petitioners to the use of water from a spring; brought to the Superior Court in Tolland County. The following facts were found by the court:

On 3d day of January, 1860, and for some time before, the Hockanum Company owned a tract of land in the town of Vernon, on which was a spring of water. North of this land and adjoining it Andrew J. Colburn owned a tract of land on which were two dwelling-houses about nine rods apart, and nearly opposite each other on an east and west line; the east one of which Colburn occupied as a residence. He desired to sell the west part of the tract with the other dwelling-house and a barn thereon, and the petitioners desired to buy a place for a residence.

The premises which Colburn desired to sell were destitute of water, but he represented to the petitioners that he owned the land on which the spring was situated, and had control of the spring, and could secure and convey to them the right to take water from the spring by a ditch and pipes for the use of the premises, and promised them that in case they should buy the place he would secure to them for the use of the house and premises the right to take one-half of the water from the spring by proper ditches and pipes, and that he and they at joint and equal expense would put and keep the spring in proper condition by mason-work, and would convey the water from it by a suitable ditch and pipe to a spout on the premises designated by a large stone, from which point each party might at his own expense take the water in branch pipes of equal size to the two dwelling-houses. This was agreed upon between them, but was not reduced to writing. Thereupon the petitioners bought of Colburn the west dwelling-house and premises, and he conveyed the same to the petitioner, Ellen Legg, wife of the other petitioner John Legg, by deed, dated January 3d, 1860, and the petitioners immediately went into possession, which possession has ever since continued. The agreement of Colburn with the petitioners regarding the spring of water and taking water from it and his representations regarding his ownership of the spring, and his promise

Legg v. Horn.

that he would convey to them the right to use the water at the house and on the premises in question, in case they should buy the same, had a controlling influence with the petitioners in inducing them to buy the property. Immediately after the deed had been given, and in pursuance of the agreement as to the water, Colburn and the petitioners constructed a main ditch from the spring across the land of the Hockanum Company, and across the premises conveyed to a point thereon designated by a large stone, and laid therein a suitable main pipe of one and one-half inches in diameter, and put the spring in good condition, all at their joint and equal expense, the petitioners' half of which was something over \$100. From the point of the termination of the main pipe, Colburn conveyed water by ditch and branch pipe to his own house, and the petitioners in like manner to theirs, the pipes being of the same size, three-fourths of an inch in diameter. The work was completed by the 15th of April, 1860, and in June following the petitioners carried the water by a branch pipe, from their own pipe, to the barn.

In January, 1863, the Hockanum Company sold and conveyed the land on which the spring was situated, to Colburn. In April, 1864, Colburn sold and conveyed his own dwelling-house and premises to Frederick Horn, the respondent, and with them the land that he had purchased of the Hockanum Company. His deed was an absolute one, containing no exception of the rights of the petitioners in the spring and water.

After the respondent took his conveyance of Colburn he claimed pay of the petitioners for the use of the spring, and from time to time made the demand, but the petitioners continued to take the water by means of the pipes in the same manner as before, and claiming the right to do so under their agreement with Colburn, until the 16th of November, 1875, when the respondent cut the main pipe on the land formerly owned by the Hockanum Company and entirely stopped the water from going to the premises of the petitioners, and was engaged in diverting the water from the spring at the time the petition was served on him, and has ever since forbidden the petitioners to use the spring and the water from it.

The respondent took his conveyance from Colburn with full knowledge given him at the time by Colburn and the petitioners regarding the agreement as to the spring, and with full knowledge that the petitioners were then in the use and enjoyment of the spring by virtue of the agreement by the ditches and pipes connected with it, and the same were pointed out to him on the premises by Colburn before he took his conveyance, Colburn informing him that he sold him the property as it then was.

Upon these facts the case was reserved for the advice of this court.

M. R. West and B. H. Bill, for the petitioners.

1. The petitioners had acquired a complete legal title to the easement, by their fifteen years adverse use of the water. A title to an easement may be so acquired as well as to the fee of land. *School District v. Lynch*, 88 Conn., 330; *Coe v. Wolcottville Manuf. Co.*, 85 id., 175. The fact that the use of the water was under an agreement does not affect the case, so long as an adverse right was claimed under the agreement. *Comins v. Comins*, 21 Conn., 418; *Catlin v. Decker*, 38 id., 262; *Johnson v. Gorham*, id., 513, 521; *Clark v. Gilbert*, 89 id., 94; *Bryan v. Atwater*, 5 Day, 181; *Barker v. Salmon*, 2 Met., 82; *Brown v. King*, 5 id., 173; *Sumner v. Stevens*, 6 id., 837; Washburn on Easements, ch. 1, sec. 4, § 28.

2. The petitioners had a clear equitable title to the easement. The agreement with Colburn was on an adequate consideration, and the right to the water of the spring was a controlling consideration in their determination to purchase. The respondent bought of Colburn with full knowledge of this agreement and of what had been done under it. *Blatchley v. Osborn*, 33 Conn., 226. The agreement is not within the statute of frauds. *Eaton v. Whitaker*, 18 Conn., 222; *Green v. Finin*, 35 id., 178; *Pritchard v. Todd*, 38 id., 413.

3. The remedy by injunction is the proper one. *Kerr on Injunctions*, 898; *Roath v. Driscoll*, 20 Conn., 588; *Rock Manuf. Co. v. Hough*, 39 id., 204; *Keeney & Wood Manuf. Co. v. Union Manuf. Co.*, id., 580. The remedy at law is

wholly inadequate. *New London Bank v. Lee*, 11 Conn., 121; *Chipman v. City of Hartford*, 21 id., 498; *Swift v. Larrabee*, 31 id., 237; *Webber v. Gage*, 89 N. Hamp., 182. The injury is a continuing one. *Harding v. Stamford Water Co.*, 41 Conn., 87.

G. G. Sill, with whom was *J. R. Wittig*, for the respondent.

1. What interest did the petitioners acquire by their agreement with Colburn and the subsequent acquisition of the title to the land and spring by him? Clearly none as against the Hockanum Company, for this company had no knowledge of the acts of these parties. Their right in this land and water was either an easement or a license. Colburn could have granted no easement, as he had no title. Washburn on Easements, ch. 1, sec. 3, § 1. If an easement, it was acquired by prescription or estoppel. It could not have been by prescription, which supposes an ancient grant, because the court has found that it was created by an unwritten contract. Under the ancient doctrine of prescription enjoyment the proper length of time was conclusive evidence of title; at this day it only raises a legal presumption of such title which may be rebutted by other evidence. Washburn on Easements, ch. 1, sec. 4, § 4. Their whole interest was derived from the contract with Colburn. Any presumption of a grant is rebutted by the finding of the court. There could have been no acquisition by way of estoppel, because there was no written grant by Colburn. The statute of frauds prevents the acquisition of an interest in lands, except by a written instrument or by adverse use. Here there is no single element of adverse use. Washburn on Easements, ch. 1, sec. 4, § 26. They went into the enjoyment of the spring, not under any claim of right, but through a contract with the pretended owner, Colburn. The court does not find any adverse use. If Colburn had been the actual owner of the premises, all they would have got by his contract would have been a mere license. The court finds that they used the water by virtue of their agreement with Colburn; this is the base

of the right; there is no other. An easement implies an interest in the land in or over which it is to be enjoyed. A license carries no such interest. Washburn on Easements, ch. 1, sec. 1, § 5. If it was a mere license, it was revocable by Colburn or Horn. Washb. on Easements, ch. 1, sec. 1, § 5; id., ch. 1, sec. 2, § 2; id., ch. 3, sec. 4, § 14; id., ch. 3, sec. 4, § 23; *Collins Co. v. Marcy*, 25 Conn., 239; *Foot v. N. Haven & Northampton Co.*, 23 id., 214.

2. But it is said that Horn bought this lot with full knowledge of the agreement of Colburn and the petitioners. But this only proves that Horn knew of the existing license. This could not prevent him from revoking it. His knowledge was merely knowledge of an agreement entirely ineffective even against Colburn, if the latter had chosen to revoke it. Horn can not be any worse off than Colburn himself would have been.

3. The court is asked to prevent Horn from cutting the pipe. But this he had done before the injunction was issued. They also ask that he shall be prevented from going upon his own land at the point where he had severed the pipe and connect with a pipe to his own house. That he had a right to use the water will not be denied. Each person can use his own, if in that use he hurts no one else, and sometimes when he does. The petitioners were not injured because Horn used the water. A court of equity could not re-connect the pipes for their use. They received their injury by the cutting of the pipe—not from any use of the water by Horn. If the injunction is granted, it will not restore the water to the petitioners; it will simply deprive Horn of enjoying what is clearly his own. A court of equity will not do injustice to one man because it cannot restore to another his just rights.

4. The mischief having been done before the injunction was granted, the petitioners' remedy was by an action at law. Washburn on Easements, ch. 6, sec. 3, § 4. That remedy was adequate, and a court of equity should not interfere. *Whittelsey v. Hartford, Providence & Fishkill R. R. Co.*, 23 Conn., 421.

CARPENTER, J. The respondent claims that the agreement of Colburn with the petitioners was simply a license, revokable at pleasure. We think it was more than a license; it was an agreement for a purchase. A valuable consideration was paid for it. It was a part of the sale of the real estate. The agreement in every respect, except the conveyance of the legal title, was carried into effect. Upon the faith of it the dwelling-house was purchased, and the petitioners expended their money in laying the pipes and fitting the house for the use of the water. We think the petitioners thereby acquired an unusually strong equitable title; so much so that a court of equity, at any time after Colburn purchased of the Hockanum Company, would not have hesitated to decree a specific performance. Not only have the petitioners an equitable title, but they have now a perfect legal title. They used and enjoyed the water under the agreement continuously for more than fifteen years. It is now well settled that an easement will be acquired in this state by an adverse use of fifteen years. Washburn on Easements, 19, 66, 67; *School District v. Lynch*, 33 Conn., 330; *Coe v. Wolcottville Manufacturing Co.*, 35 Conn., 175. Such use is adverse, if under a claim of right, even though it may have commenced under a contract of purchase or a parol gift. *Comins v. Comins*, 21 Conn., 413; *Catlin v. Decker*, 38 Conn., 262; *Clark v. Gilbert*, 39 Conn., 94.

The petitioners' title being good, both in law and equity, it only remains to inquire whether they are entitled to equitable relief.

Upon this question we entertain no doubt. To oust a court of equity of jurisdiction the remedy at law must be obvious, adequate and complete. *Chipman v. City of Hartford*, 21 Conn., 488; *Swift v. Larabee*, 31 Conn., 225. A court of law can only give damages for being deprived of the use of the water. It is at least doubtful whether damages can be given covering the previous outlay for pipes and fitting the house for receiving and distributing the water. However this may be, it is certain that a court of law cannot restore to the petitioners the use of the water; nor is there any certain

rule or standard by which the value of the future use can be ascertained. They are entitled to the use of this water. Their right in this respect is such that a court of equity will protect it.

We are of the opinion that the petitioners have a right to enter upon the land of the respondent for the purpose of repairing the pipes and restoring the spring to its former condition, so as to give to the petitioners their proportion of the water from it, and that the respondent should be enjoined from doing any act preventing or interfering with the exercise of such right. He should be further enjoined from diverting or using the water of the spring in any way or manner or for any purpose that shall deprive the petitioners of the use and enjoyment of one-half of it.

The Superior Court is advised to decree accordingly.

In this opinion the other judges concurred.

SUSAN E. SMITH *vs.* THE BANK OF NEW ENGLAND.

The act (Gen. Statutes, tit. 19, ch. 5, sec. 11,) provides that "when a married woman shall carry on any business and any right of action shall accrue to her therefrom, she may sue upon the same as if she were unmarried." Held that a declaration in trespass for goods taken which described the plaintiff as "a married woman carrying on business," but did not allege that the goods were used by her in her business or that the cause of action resulted from her business, was insufficient.

And held that the defect was not cured by a verdict for the plaintiff.

TROVER, with a count in trespass; brought to the Superior Court in Middlesex County, and tried to the jury on the general issue, before *Park, C. J.*

The declaration was as follows: Then and there to answer unto Susan E. Smith, wife of Whitby M. Smith, of said East Haddam, a married woman, carrying on business, in a plea of the case, whereupon the plaintiff declares and says that on

Smith v. Bank of New England.

the 8th day of February, 1875, she was possessed of certain articles of personal property, to wit: one hundred and forty-two pieces of ribbon, of the value of two hundred dollars; four boxes of feathers, of the value of thirty-two dollars; two boxes of flowers, of the value of ten dollars; one box of ruches, of the value of six dollars; eighteen untrimmed hats, of the value of fifteen dollars; and twelve hat frames, of the value of five dollars, which were her own proper goods; and being so thereof possessed, she afterwards, on the 8th day of February, 1875, at East Haddam aforesaid, lost the same out of her possession, which afterwards, on the same day, came into the hands and possession of the defendants by finding, (alleging a demand and conversion.) And the plaintiff further declares in an action of trespass for the same cause of action and says that the defendants, on the 8th day of February, 1875, with force and arms seized, took and carried away certain goods and chattels, to wit: (describing the same articles,) the proper goods of the plaintiff, and all of the value of four hundred dollars, and then and there converted and disposed of the same to their own use.

Upon the trial the plaintiff offered evidence, and claimed, that prior to and at the commencement of the present action she was the wife of Whitby M. Smith, with whom she was living as her husband; that in the year 1867 she had by her own hands earned the sum of \$115; that some time in that year she invested the same in goods suitable for the prosecution of the millinery business, which business she was carrying on in her own name, and with the knowledge and consent of her husband, down to the 8th day of February, 1875, when the defendants, in a writ of attachment against said Whitby M. Smith, seized the goods, with others belonging to the plaintiff, and subsequently converted the same to their own use, having sold on execution obtained against said Whitby M. Smith all the goods so attached except those sued for in the present action, and returned the execution partially unsatisfied.

The defendants requested the court to charge the jury that, upon these facts, the cause of action, if any existed, did not

result to the plaintiff from her business, and that she could not sustain the action in her own name. But the court did not so charge the jury, but charged them that the plaintiff could maintain the action in her own name.

The jury having returned a verdict for the plaintiff, the defendants filed a motion in arrest of judgment for the insufficiency of the declaration, and also a motion for a new trial for error in the charge of the court, which motions were reserved together for the advice of this court.

S. L. Warner and *D. Chadwick*, in support of the motions.

R. D. Hubbard and *A. B. Calef*, contra.

LOOMIS, J. This is an action of trespass and trover brought by a married woman in her own name. It is conceded by the plaintiff's counsel that the action can only be sustained by authority of the statute (General Statutes, p. 417, sec. 11,) which provides that "when a married woman shall carry on any business, and any right of action shall accrue to her therefrom, she may sue upon the same as if she were unmarried."

The declaration simply describes the plaintiff as "a married woman carrying on business," but there is no allegation whatever that the goods taken by the defendant were the goods used in her business or that the cause of action resulted from her business.

At common law a married woman could not under any circumstances sustain a suit at law in her own name while her husband was living within the same kingdom. And such is still the general rule. With all the enlargement of the rights of married women, our statutes when this suit was commenced had introduced only two exceptions in reference to suits by them; one by the act of 1853, which provided that in case of abandonment of the wife by the husband she might, during the continuance of such abandonment, transact business in her own name, and sue and be sued as if unmarried; and the other is the statute before cited which controls this case.

As was held by this court in *Edwards and wife v. Sheridan*, 24 Conn., 165, the alterations made by the statutes relative to married women constitute exceptions to the general rule, and the allegations in the declaration must explicitly bring the case within one of the exceptions. To bring the case at bar within the statutory exception before mentioned some averment to show that the cause of action accrued from the business carried on by the plaintiff was indispensable, and the want of such allegation makes the declaration fatally defective. But as the question here was first raised by motion in arrest of judgment after verdict, it is necessary to determine whether the defect was of such a nature as to be cured by the verdict.

One criterion to aid in determining this question was first laid down by Lord Mansfield in the leading case of *Rushton v. Aspinall*, reported in Douglass, 679, the principle of which is usually thus expressed: "A verdict cures the statement of a title defectively set out, but not of a defective title."

We think the case at bar comes under the head of a defective title rather than a mere inaccurate statement of the plaintiff's title or cause of action. The right of the plaintiff to maintain the suit depended not merely upon the facts ordinarily applicable to trespass and trover, but upon another distinct and substantive fact, that the cause of action accrued from the particular business which she was carrying on, and this being totally omitted there can be no ground for presuming the fact to have been proved at the trial.

There is a sufficient analogy between this case and those in which the cause of action is given by some statute, to make a reference to the rule in the latter cases pertinent as an illustration. It is a well-settled rule of pleading, that, in declaring upon a cause of action arising under a statute, the plaintiff must state specially every fact required by the statute to ground the action, so that the court may judge whether the liability of the defendant under the statute has accrued; and if this be not done, the declaration is bad after verdict. *Bartlett v. Crozier*, 17 Johnson, 439; *Williams v. Hingham & Quincy Bridge & Turnpike Co.*, 4 Pick., 340.

So here, as the plaintiff's right to sue is wholly statutory, and as one essential prerequisite to maintain the action is wholly wanting, we do not see why such an omission is not just as fatal as it would be if the cause of action arose wholly under the statute and belonged strictly to the class just mentioned.

There is probably no writer upon the science of pleading who has used clearer language or more apposite illustration on the subject we are considering than Judge Gould in his celebrated treatise upon Pleading. In chapter X., sect. 22, he says:—"If the declaration omits to allege any substantive fact which is essential to a right of action and which is not implied in or inferable from the finding of those which are alleged, a verdict for the plaintiff does not cure the defect." This legal proposition is copiously illustrated in sections 22 to 25 inclusive, leaving no doubt as to the meaning.

Now apply this test to the case at bar. Two questions are involved in the application.—1st. Is it a substantive fact, essential to the plaintiff's action, that the cause of action accrued from the business? This we have already answered in the affirmative.—2d. Is the above mentioned fact implied in or inferable from any facts which are alleged and found?

On examining the declaration we find the plaintiff described as "a married woman carrying on business," but this is a mere matter of *descriptio personæ*, and has no relation to the cause of action whatever, and of course it cannot show in what the cause originated. Again, it is alleged that the plaintiff was "possessed of certain goods and chattels," which "were her own proper goods and estate." But how can the fact that the cause of action arose in the business be implied in or inferable from the allegation that the goods were hers? There is no necessary or even natural dependence of one of these facts on the other. If it had been alleged that the goods wrongfully taken were owned by the plaintiff and used in her business, such an inference might have been admissible. But the allegation of possession and ownership is entirely consistent with a possession and title derived in any other way than from her business or used for any other

purpose. The property might have been a part of her sole and separate estate. She might indeed have been a mere bailee. And proof of such special title and possession or right to the possession would have satisfied every averment in the declaration.

But it was suggested in the argument for the plaintiff, that in proving her title she may have shown that the cause of action accrued from her business. This is quite possible, but to avail the plaintiff the two things must have such a relation that one is legally inferable from the other, which is not the case. And here an important distinction is to be kept in mind. The presumption which after verdict cures a defective statement is not founded on the idea that the plaintiff on the trial made out a good case independent of the declaration, but that in proving the allegations *as actually made* the omitted fact was *necessarily involved*. A plaintiff is not bound to prove any other case than what he has substantially alleged, and if he proves this he is entitled to a verdict without reference to its legal sufficiency. *Spieres v. Parker*, 1 T. R., 141; *Griffin v. Pratt*, 3 Conn., 513; Gould's Pleading, chap. X., sections 23 and 24.

In the case of *The United States v. The Virgin*, 1 Peters C. C., 7, which was an information against a vessel for receiving from another vessel bound to the United States, goods without a permit, against the act of Congress, the decree of the District Court, on the finding of the jury against the vessel, was reversed, because the libel did not allege it to have been done within four leagues of the coast, and without that fact there was no forfeiture under the act. Judge Washington, in giving the opinion, said:—"The plaintiff is not bound to prove more than he lays in his declaration, and therefore we must presume the case stated in it to have been proved, and no other. If a proper case be laid, but not with sufficient precision, and the defendant will not at the proper time take advantage of the defect, the court after verdict will presume that the want of precision was supported at the time by evidence; because, as a proper ground for such evidence was laid, it would have been proper; not so if no ground at all is laid."

For these reasons we advise that judgment be arrested.

In this opinion the other judges concurred.



EDWARD R. LANDON AND ANOTHER, ADMINISTRATORS, *vs.*
CHARLES A. MOORE AND OTHERS.

A testator made the following bequest: "I give to my daughter *M*, wife of *C*, one-third of all the residue of my estate, real and personal, to hold the same to her and her heirs, to her sole and separate use, free from the interference or control of her husband; at her death to go immediately to her children, if she have any; her husband, if he survives her, not to have any use of the same, but that it be for her children." Held that the estate given was a fee and not a life estate.

PETITION in equity to the Superior Court in Middlesex County, asking the advice of the court as to the construction of the will of Henry M. Stannard, the petitioners being administrators of his estate with the will annexed. Facts found and case reserved for advice.

L. Harrison, for the petitioners.

W. T. Elmer, for the principal respondent.

PARK, C. J. The only question of importance in this case is, whether Mary I. Moore takes an estate in fee under the twelfth clause of the will of her late father, or takes only an estate for life. The clause in question is as follows: "I give, bequeath, and devise to my daughter, Mary Isabel, wife of Charles A. Moore, one-third of all the rest and residue of my estate, both real and personal, to hold the same to her and her heirs, to her sole and separate use, free from the interference and control of her husband; at her death to go immediately to her children, if she have children at that time. It is my will and direction that in case of her husband's surviving her, (my said daughter Isabel,) he shall not have any use or

improvement of the same, but that it be for her children." Whatever doubt there is with regard to the matter is created by the words "at her death to go immediately to her children," and "that it be for her children." These expressions, disconnected from the context, would indicate a life estate, but when taken in connection with it show clearly what was in the mind of the testator when he incorporated them in his will. He was very anxious to have it clearly appear that his daughter's husband should have no part whatever of the income of the property he was giving her; and this anxiety led him to use particular care, and to say, that after her death he should have no part of the "use or improvement of the same." This provision is inconsistent with a devise of a life estate to the daughter, and is only consistent with a gift to her of an estate in fee. A life estate in the daughter would become extinguished at her death, leaving no estate to be enjoyed by the husband; but inasmuch as there were children of the marriage the husband would have an estate for life in the real estate of the wife, held by her in fee, unless the estate was given to her for her sole and separate use. The testator seems to have been aware of this, and to have been determined to put the matter beyond all doubt. He first declares that the property shall be held by her "to her sole and separate use," but fearing that this was not enough he adds, "free from the interference and control of her husband;" and then to make the matter more sure, he adds, "at her death to go immediately to her children." Why was that word "immediately" inserted? It seems to us to be significant, and to show his desire that the estate should not linger in the hands of her husband, after her death, lest he might be able in some way to get a hold upon the income of the property.

We are satisfied that the testator intended to give an estate in fee to the daughter in the twelfth clause of his will, and that what he said with regard to the property going to her children after her death, was said to make it clear that the property was to be her sole and separate estate, with no right in it on the part of her husband.

This construction is further supported by the fact that, in the eleventh clause of the will, the testator grants an estate for life to his wife, and uses proper language for the purpose; thereby showing that if he had intended to grant only a life estate to the daughter, in the clause in question, he knew how to do it, and would have used appropriate language for the purpose. He granted estates in fee in other clauses of the will, in clear and definite terms; and it is conceded that the language made use of in the twelfth clause was amply sufficient to convey a fee had the testator omitted that part of it which we have considered.

The construction we have given is further supported by the fact that the testator declares his intention in his will to treat his two daughters equally in the disposition of his property. That intention must have been immediately changed after it was expressed, if he granted only a life estate to his daughter Mary in the clause in question.

We advise the petitioners that Mary I. Moore takes an estate in fee under the twelfth clause of the will in question.

In this opinion the other judges concurred.

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JOHN J. DUFFIELD AND OTHERS vs. ERASTUS BRAINERD AND OTHERS.

Several persons who were tenants in common of certain quarry lands formed a copartnership in 1850 to carry on the quarrying business, the several partners putting in their interests in the quarry lands, and having a corresponding interest in the copartnership. One of the interests thus put in was owned by *M*, a widow, for life, and subject to her life estate, by *P* her daughter, and the interest in the copartnership was owned by them in the same manner. By the partnership agreement the copartnership was to continue so long as a majority in interest should desire. The business was continued, by assent of all parties, through several changes by death and succession, until 1872, when *M* died, giving by will all her interest, which was mainly her share of the undivided profits, to her grandchildren, who with her administrators were the petitioners. These profits had been very large, but instead of being divided had

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been invested in other quarry lands, which had been in part worked. After 1872 the business was still carried on as before, under the management of *B*, who had been the principal manager from the first. In 1874 the petitioners, having previously demanded of *B* an account and payment of the moneys due them from the copartnership, brought a bill in equity praying that all the property bought with the profits of the business previous to the death of *M* might be sold, and their share of the money paid over to them, that an account be taken of all the copartnership dealings, and that a receiver be appointed. The petition averred that the petitioners, by reason of the deaths of members of the copartnership and the confusion of interests, were unable to say whether the copartnership was dissolved, but that they believed and therefore averred that it was dissolved. *B*, as manager of the business, had incurred large personal obligations, and a large amount of property taken by him for debts due the copartnership had greatly depreciated. Held—

1. That the copartnership was to be regarded as continuing by consent of the parties succeeding to the interests of members who had died, and as still existing.
2. That the allegation that the petitioners were unable to say whether there had been a dissolution or not, but that they believed and therefore averred that the copartnership was dissolved, was not an averment that the copartnership had been dissolved by a withdrawal of the assent under which it had been continued and a demand for a dissolution.
3. That the demand by the petitioners of an account from *B*, and of payment of their share of the profits, did not constitute a demand for a dissolution.
4. That the petitioners were not entitled to demand in cash the value of their interest, inasmuch as they had consented to let the business go on under the management of *B*, and having taken their chance for profits from the use of their share by the copartnership they were to share the risks of loss from the continuance of the business.
5. That the petitioners could effect a dissolution of the copartnership by giving distinct notice to *B* that they should not longer consent to its continuance, and should hold him accountable as a surviving partner for the further use of their share of the copartnership property.

BILL IN EQUITY for a disclosure and account, the payment of moneys found due, and the appointment of a receiver of partnership property; brought to the Superior Court in Middlesex County. The facts were found at great length by a committee and the case reserved for advice. The disposition made of the case by this court renders it unnecessary to state the facts more fully than they are given in the opinion. The principal points argued by the counsel become also for the same reason unimportant.

F. Chamberlin and *E. S. White*, for the petitioners.

R. D. Hubbard, R. G. Pike, D. Chadwick, and S. L. Warner, for different respondents.

PARDEE, J. In 1850 Erastus Brainerd, Erastus Brainerd, Jr., Frederick Hall, Joseph Stancliff, Mary M. Brainerd and Ellen M. Duffield, (the two latter by agent and trustee,) entered into a written copartnership agreement for the purpose of carrying on the business of quarrying and selling stone, for such length of time as a majority in interest of the partners should request and demand. At this time they were the owners of cattle, tools, carts, &c., of the value of \$50,000, and quarry lands of the value of \$235,000, and this property constituted their capital stock, and was owned in the following proportions, viz: Erastus Brainerd, five-sixteenths; Erastus Brainerd, Jr., two-sixteenths; Mary M. Brainerd and Ellen M. Duffield, five-sixteenths; Frederick Hall, two-sixteenths; Joseph Stancliff, two-sixteenths. The said Mary M. Brainerd had an estate for life in an undivided interest in the real estate, as widow of Silas Brainerd, and the said Ellen M. Duffield, who was her daughter, had an estate in fee in the same interest subject to her mother's life estate, and the interest in the copartnership held by them and representing this real estate, was held by them in the same way.

Frederick Hall died in 1867; Erastus Brainerd in 1861; Joseph Stancliff in 1870; Mary M. Brainerd in 1872. Erastus Brainerd, Jr., and Ellen M. Duffield, now Ellen M. Pike, and daughter of said Mary, still survive; the petitioners are the children of Ellen M. Pike, joining with William J. Osborne, administrator upon the estate of the said Mary; the respondents are Erastus Brainerd, Jr., and the representatives of the several deceased partners.

Notwithstanding these successive deaths the copartnership business has been continued to the present time by the managers without interruption or change, and without objection on the part of the representatives or heirs of any deceased partner, except that the administrator upon the estate of Mary M. Brainerd called upon Erastus Brainerd, Jr., then and still the chief manager, for an account and payment of the money due to that estate, and in November, 1874, brought

this petition in equity. In it the petitioners allege, among other things, that the said Mary M. Brainerd was entitled during her life to five forty-eighths of all the rents and profits accruing from said business, and that by the terms of the copartnership these were to be divided; and that although these profits were in 1871 more than \$97,000, in 1872 more than \$120,000, in 1873 more than \$78,000, and prior to 1871 were \$300,000, yet the managers have refused to pay to the petitioners their proportionate share thereof, and have invested the same in the purchase of property not needed for the successful working of the quarries and have not used them in the legitimate business of the partnership.

They also allege that, by the death of sundry partners and other changes, and by the division and confusion of interests, they are unable to say whether the copartnership has been dissolved or not, but that they believe, and therefore say, that it has been dissolved and terminated.

They also pray that if it should appear that the copartnership has been dissolved, the court will order an account of its transactions during the time of Mary M. Brainerd's life, and that the respondents be directed to pay to the petitioners such sums as shall be due to her estate and to the said legatees, and that some proper person be appointed a receiver, with authority under the direction of the court to sell that part of the property which is within this jurisdiction, ascertain the value of that which is without, to collect the money due to the partnership, and hold the same subject to the order of the court.

After the death of any partner his representatives have joined with the surviving partners in permitting and requesting Erastus Brainerd, Jr., who has been the chief manager of the partnership from its organization to this present, to continue the business as that of a partnership in form and fact; no one of them declared a dissolution, or asked the court to enforce one; they severally accepted their respective proportions of profits specifically as dividends earned by a continuing partnership, and not as a percentage of assets returned after a final settlement of partnership affairs. And, although

the representatives of Mary M. Brainerd made a demand upon the chief manager for an account and for the amount due the estate of said Mary M., and received for answer that he could not tell how to state such an account or what was due, they rested upon that answer; they interposed no objection to a continuance of the business by a partnership; they permitted Mr. Brainerd to believe, and act upon the belief, that they would not insist upon any rights other than those to which they would be legally entitled as partners; they suffered him to bear the weight of individual obligations to the extent of \$128,000 for the protection of the property, knowing that they had given him reason to believe that they would only demand their share of what should remain after these obligations had been discharged, and after a final settlement of the business as that of a partnership continued to a time thereafter to be specifically fixed. As between themselves and Mr. Brainerd they are to be held as having, in consideration of his individual advancements and continued services for the protection of their common interests, agreed with him to postpone the enforcement of their legal right to a dissolution as of the day of Mrs. Brainerd's death to a day to be named by them in the future, and as having notified him that they had elected that he should conduct the business as that of an uninterrupted partnership, and to accept on such future day, of the assets which should then remain, such proportion as the law of partnership would give them; they are to be held as having agreed not to hold him solely accountable for all possible losses as a surviving partner wrongfully using and exposing their property against their will to the hazards of the partnership business.

Having thus induced him to manage the business as one of continuing partnership and entitled themselves to the greater profits which might result from that relation, they should likewise share with him its risks and obligations, until they shall give him distinct and precise notice that from and after a day to be named by them they reverse their previous election that the partnership should continue, and that from thenceforth they shall hold him accountable as a surviving partner

wrongfully continuing the use of their share of the partnership property.

From the service of such notice the general rule of law terminating a partnership upon the death of a member, the operation of which in this particular case has been restrained by the petitioners, will come into action, and they will be entitled to the aid of a court of equity in enforcing it. From that date it will be the duty of the managers to close the business of the partnership as speedily as a proper regard for the interests of all concerned will permit; and when all debts are paid the assets remaining should be divided as if upon the day of the notice the copartnership had expired by an express limitation incorporated in the articles of its formation.

We do not regard the petition as such an unequivocal declaration of their desire to reverse their original election as will justify us in saying that the service of it shall stand for the notice above indicated; for in it the petitioners admit that they are unable to say either that the partnership has or that it has not been dissolved; only, that they believe, and therefore aver the former. This is to be interpreted as suggesting with hesitation that possibly the law of the events mentioned may have overborne their will in the matter and forced upon them a dissolution, contrary to their desire for a continuance of the partnership.

In the fourth paragraph they allege that the copartnership continued to the death of Mrs. Brainerd, notwithstanding the previous deaths of partners, and in the sixth they request the court to order the sale of such property paid for from undivided profits as is not required for the proper use of the business of the partnership and a division of the proceeds thereof; indicating thereby a desire not to bring that business to a termination.

As we are of opinion that the petitioners are not entitled to a decree declaring the partnership to have been dissolved at the death of Mrs. Brainerd, and ordering a division of the assets upon the basis of the manager's inventory and valuation made in March, 1878, for the ordinary purposes of the partnership; and as the finding does not support the allega-

tion as to the wrongful investment of profits, and furnishes no justification for the interference of the court in the matter of hastening a division thereof, we advise the Superior Court that, upon the allegations in the petition, the petitioners are not entitled to the relief prayed for; but, we also advise that court to continue the petition upon the docket until the term succeeding that at which this advice is communicated to it, for the purpose of giving opportunity to the petitioners to file, if they then are able and desire so to do, a supplemental bill containing allegations to the effect that they have given to the respondent, Erastus Brainerd, the notice suggested in the foregoing opinion, and that he thereafter conducted the business as that of a continuing partnership.

In this opinion the other judges concurred.



**GEORGE H. BISHOP AND ANOTHER, TRUSTEES, vs. THE CLAY
FIRE AND MARINE INSURANCE COMPANY.**

The plaintiffs, who were trustees under a second mortgage of a railroad company, were in possession of and operating the road in 1874, and at that time procured of the defendants, a fire insurance company, a policy of insurance on a freight depot belonging to the road, the policy describing the insured as "trustees of the convertible mortgage" of the railroad company, and the property as "their frame freight depot building occupied by them," and containing a provision that "if any change shall take place in the title or possession of the property, whether by legal process, judicial decree, or voluntary transfer, this policy shall become void," and a further provision in another section, that "if the property is disposed of, so that all interest on the part of the assured has ceased, this insurance shall immediately terminate." In May, 1875, the state treasurer, as trustee under a prior mortgage of the road, obtained a decree of foreclosure against the plaintiffs as trustees under the second mortgage, and against the railroad company, which decree, by a failure to redeem, became absolute in June, 1875. The state treasurer took possession of the road and appointed the plaintiffs his agents to operate the road. They continued to do so, one of them acting as superintendent, as he had done while trustee. The state treasurer soon after conveyed the entire property to a new corporation, constituted of the holders of the first mortgage bonds, and the new company appointed another superintendent, who took

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charge of the road early in August, 1875. On the 16th of August, and within the term of the policy, the building insured was burned. The building was at this time and had from the first been in the possession and charge of one *B* as a freight agent. The plaintiffs, while acting as trustees, had advanced and become personally liable for over \$83,000 for the benefit of the road, a large part of which claim was in existence when the insurance was effected and remained unpaid at the time of the fire. For this they claimed a first lien upon all the property of the road, and the court, in the decree of foreclosure against them, provided for this claim as such a lien, to be discharged from the first earnings of the road. In a suit on the policy it was held—

1. That the foreclosure of the first mortgage and the conveyance of the railroad property by the state treasurer to the new company, constituted such a transfer of the property insured as terminated the insurance under the terms of the policy.
2. That the interest which the plaintiffs had in the property, by virtue of the lien given by the decree for their advancements and liabilities, was a different interest from that which they had held as trustees and which had been insured, and was not sufficient to save the policy from the effect of the transfer. [Two judges dissenting.]
3. That parol evidence was not admissible to show that the insurance, under the description in the policy of the property insured, was really intended to apply to the interest which the plaintiffs had in the property by reason of their advancements and liabilities.

ASSUMPSIT on a policy of insurance, brought to the Superior Court in Middlesex County, and tried to the jury on the general issue, with notice of a claim that the policy had been rendered void by a change of the title and possession of the property insured, before *Martin, J.*

The plaintiffs were trustees of the convertible mortgage bonds of the New Haven, Middletown & Willimantic Railroad Company, by succession to the original trustees under the mortgage, and as such trustees had possession of and were operating the road at the time the policy was issued, which was December 17th, 1874. The policy insured "the trustees of the convertible mortgage of the New Haven, Middletown & Willimantic Railroad Company against loss or damage by fire, to the amount of two thousand dollars, for the period of one year, on their frame freight depot building occupied by them and situated near the corner of Main and Spring streets in the city of Middletown."

The policy contained the following provisions, in different sections:

"If the property be sold or transferred, or any change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance, this policy shall be void."

"If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of this policy; otherwise the policy shall be void. When property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate."

Upon the trial the plaintiffs offered the following testimony; it being admitted by the defendants that they were at the time of the insurance and still were an insurance company, incorporated by the legislature of Kentucky, and authorized to make contracts of fire insurance, and record evidence being laid in that the plaintiffs had been duly appointed as trustees on the 21st of February, 1874, in the place of the original trustees under the mortgage, who had resigned; the policy was also laid in and its execution admitted.

A. F. FOWLER. I am an insurance agent. I issued this policy. I examined the property before insuring. When there is any change in the title of the property insured it is my custom to notify the parties that a transfer of the policy is necessary. It has been my custom for years while acting as agent for the Clay Insurance Company. (Evidence of the custom was objected to by the defendants and admitted subject to objection, the defendants excepting.) I knew there was a first mortgage upon the property before the convertible mortgage when I took the risk.

Cross-examined. I have been an insurance agent for six years. Acted for defendants till December, 1875, when they withdrew from the state. They had no successor to me here. I paid them in the neighborhood of one thousand dollars. I issued about forty policies. I received instructions from time

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to time by letter and from the general agent. I took risks and submitted them to the company. If they accepted they wrote me. I do not know whether I have my letter of appointment; will produce it if I have. My instructions were to find and take risks for the company. I received instructions as to maximum risks, also as to prohibited risks. These are all my instructions. During the six years that I have acted as an insurance agent I have sent notices to parties who have transferred their property that they must get the consent of the insurance company to have their policies continued. I acted as agent for this company from the summer of 1874 till the close of 1875. Most of the risks were taken in the summer of 1875. Don't know of any property which I insured where I gave notice that a transfer of policy was necessary. I can not mention a single instance. It is my custom generally. The trustees of the convertible mortgage were in possession when I took the risk. I heard some talk of a change of possession about the time of the change. I did not give them notice that they must transfer the policy or get it changed. Don't know how I came to forget it.

SHERMAN N. BACON. Am freight agent of the Air Line Railroad in Middletown. Have been for three years last September. I was in charge of the depot all the time, and when the fire took place. The fire was accidental to my belief. Think it was not set on fire. Burned in August, 1875. George H. Bishop was superintendent of the railroad for a time. In December, 1874, he was superintendent, and ceased to be so in August, 1875, the same month as the fire. He had been superintendent all the time from December to August. I saw Fowler around looking at the building. Didn't know him then; know now that he was the man I saw around. Within a week from the time of the fire Bishop ceased to be superintendent. The loss was total, a few boards left only. It was burned about three o'clock in the morning.

Cross-examined. Began work Sunday morning three years ago first day of last September. Was employed by the trustees of the N. Haven, Midd. & Willimantic Railroad Company, O. V. Coffin, and W. R. Galpin. Don't know how long I was

in their employ, about a year I should think. I did not know for whom I worked after that. I kept right along and got my pay. Don't know when I commenced to work for Bishop and Camp; worked for them about two years. I suppose I worked for them up to the time Mr. Turner became superintendent, in August, 1875. That was the time the present company came in. Turner came two or three days before the fire took place. I recognized Turner as superintendent when he came a few days before the fire. He was superintendent of the Boston & New York Air Line Railroad; Bishop while trustee acted as superintendent also.

JOHN N. CAMP. I procured a policy of insurance of Mr. Fowler—the policy in question. The trustees were in possession of the road at the time. Bishop was superintendent, and continued to be superintendent till Turner came. While trustees, Bishop and myself made pecuniary advances. *Question.*—For what purpose did you insure this depot? (The defendants object to the question and the testimony is admitted subject to the objection, the defendants excepting.) *Answer.*—Partly because of the advances we were making. We did not get the insurance till December, late in the year 1874. Our advances were small at first, but we found the necessities of the road required larger advances, which we were making from time to time. Bishop and I were not consulted in advance and my consent was not given to the displacement of Bishop by Turner. I was not asked about it and Bishop was not so far as I know. I was not in town at the time of the fire. I was at Martha's Vineyard on my vacation; had been gone but a short time. I had the management of the finances while we ran the road as trustees, and Mr. Bishop had charge of the running of the road. On June 8th, 1875, the first deposit was made of money received by me as agent under the state treasurer. I understood that the agent was in possession by my permission.

Cross-examined. Can't tell how much we had advanced at the time of taking out the policy, about \$20,000. By agreement between Bishop and myself he was appointed superintendent. I had no notice of his displacement. Don't know

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whether I expected it or not. Yes, I did expect it, because I was a large owner of the first mortgage, also a director of the new company at that time. The trustees are prosecuting this suit. I instructed Mr. Baldwin to bring this suit. About a month ago the trustees assigned their interest in this insurance to the Air Line Company. When the suit was commenced the company owed us a large amount, which has been paid, and we assigned this to the company. I tried at first to get the insurance money for ourselves when the suit was brought; if I had I should have put it in my pocket. I was afraid I might not get all my claims under the decree paid by the new company. Some of the parties talked as if they might not be paid. Our possession as trustees under the convertible mortgage ended I should say in June, 1875. Bishop was superintendent afterward. He kept on. After we ceased to hold as trustees we acted for Mr. Raymond, state treasurer. I held on till early in August, 1875. I think I left Bishop in charge as superintendent when I left on my vacation. I acted as financier for the state treasurer. The whole matter was the result of a compromise. At New Haven we had a consultation; in June, I think. By general arrangement Bishop and I were to act as agents of the state treasurer in operating the road. No papers passed between us in reference to our acting as such agents. We kept running the road as we had done. I do not know whether we acted as agents or trustees. I did not know but I should take possession, for when we gave up possession I understood from my counsel that we could get possession again any time in twenty-four hours. About the first thing I did as trustee was to draw my check, and the second thing the same. The funds were kept in my name as agent while we acted for the state treasurer. Before they were kept in my name as trustee. No other change was made when we acted for him—no change in the general management, none in the books. Checks were drawn by "J. N. Camp, agent." I reported to nobody as agent. I think I made a report of the earnings to Mr. Hatch of New York, as he represented the first mortgage bond-holders, and it had been agreed that we should report to

him. Made monthly reports to him from the time I went in till I got through. I felt that I was acting for Mr. Raymond as treasurer and myself, and supposed Raymond was in possession liable to be ousted any day. It was a part of the arrangement that we were to retain possession of the road, that is, the actual possession. I never received any directions after the decree in relation to the management of the road. I ran the road as agent till about August 1st, 1875. I went to Martha's Vineyard for my vacation before the fire. Had ceased to act as agent before going there.

Direct Examination resumed. Our liens were not fully satisfied till about a month ago. I made a proof of loss soon after my vacation. Mailed it to the company in one of their long printed envelopes which I got from Fowler. Afterwards they wrote him they had not received it, and I made out another. Made it September 28th, 1875. The second proof was made February 26th. It was the same as the first. I considered the new company as in possession by my license. I had a paramount title.

Cross-examined. I never have seen the assignment since I made it. It assigned all our right, title, and interest in this insurance.

The plaintiffs here rested their case, and the defendants introduced the following testimony:—

WILLIAM E. RAYMOND. I am treasurer of this state, and was so in the spring and summer of 1875. (The first mortgage of the New Haven, Middletown & Willimantic Railroad Company to the treasurer of the state and his successors in office is put in evidence and shown to the witness.) This mortgage was foreclosed by my request in the spring of 1875. No one redeemed under the foreclosure. I cannot tell when I took possession of the road. It was in the spring of 1875. I appointed Messrs. Camp and Bishop as my agents to operate the road while in my possession. After the time limited by the decree of foreclosure for redemption had expired I made a deed to the Boston & New York Air Line Railroad Company, July 8th, 1875. I never took any actual possession of the road. Never went upon the road or looked at any of its

books. The arrangement was that I should appoint Messrs. Bishop and Camp my agents.

The defendants laid in the decree of foreclosure in favor of Raymond, as state treasurer, and trustee under the first mortgage, against the plaintiffs as trustees of the convertible mortgage and all other parties in interest, which was passed in May, 1875, and became absolute by the failure of the respondents to redeem, on the fourth Saturday of June, 1875; also the deed of Raymond as treasurer to the Boston & New York Air Line Railroad Company, dated July 8, 1875; and rested their defence.

Certain provisions of the decree claimed by the plaintiff to be important to their case, are as follows:—

And whereas, upon the answer of John N. Camp and George H. Bishop, duly filed in this cause, and a full hearing of all parties thereon, it is found by this court that there was justly due to O. V. Coffin and W. R. Galpin, [to whom the plaintiffs succeeded in their trust] for their services from the 24th day of April, 1873, to the 14th day of February, 1874, as trustees in possession of said railroad, under the mortgage thereof to them, dated the first day of July, 1871, the sum of \$2,566.66, and that said Camp and Bishop, on their coming into possession of said road, assumed the payment of the same, and that said sums are justly due at the date of this decree unto the said Camp and Bishop; and that there is also justly due to said Camp and Bishop, for their services as trustees in possession of said railroad, under said mortgage, from the 14th day of February, 1874, to the 4th day of June, 1875, and as superintendents thereof during said period, the sum of \$6,645.76; and that there is also due to them for advances made by them while such trustees in possession, the sum of \$9,669.55; and that said several sums are equitably chargeable upon all and singular said mortgaged premises as part and parcel of the sums secured by a first lien, as hereinafter is more particularly described and provided. And whereas it is further found by this court that said Coffin and Galpin, while trustees in possession of said railroad, made certain contracts and contracted thereby certain

obligations for the benefit of said railroad, and that said contracts and obligations were necessarily and properly assumed by said Camp and Bishop, as their successors in said trust, and now rest upon them; and that said Camp and Bishop, while in possession of said railroad, have themselves made a certain contract, and contracted thereby certain obligations for the benefit of said railroad; and that all and singular said contracts made by said Coffin and Galpin, and by said Camp and Bishop, were and are necessary for the proper care, management and operation of said railroad, and are and ought to be an equitable charge upon said premises embraced by and included in the terms of said first mortgage, in the manner and to the extent hereinafter specified; and that the propriety and validity of said charge is assented to by all said parties to this cause appearing in court. * * * And whereas, it is hereby found that there are sundry current expenses and accounts, heretofore incurred by said Camp and Bishop, while in possession of said railroad, in the necessary operation of the same, for running expenses, much of which is not yet payable, and all of which amount to the sum of \$4,000 as nearly as the same can now be ascertained; it is hereby further ordered and decreed that the payment of all said current bills and expenses shall be assumed and made by said petitioner, to be liquidated out of the next earnings of said railroad, while in his hands; and that if he fail to pay and satisfy any of said accounts, forming a part of said current expenses, estimated at said sum of \$4,000, and to save said Camp and Bishop, and their executors, administrators and assigns, forever harmless from the same, by reason whereof they or any of them shall be compelled to pay the same; then that said sums so by them paid, by reason of the default of said petitioner, shall be and remain, and they are hereby declared and adjudged to be, part and parcel of said first lien hereinafter and hereby ascertained and declared to attach to said railroad, railroad property, rights and franchise, prior and paramount to said first mortgage, in favor of said Camp and Bishop, their executors, administrators, and assigns, as is next hereinafter provided. And

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upon the several facts and findings hereinbefore set forth, and with the assent of all said parties to this suit appearing in the same and after due notice to all parties in interest, now therefore, in consideration thereof, it is hereby further ordered, adjudged and decreed that the aforesaid charges of said former and present trustees in possession, for services and advances, and said obligations, growing out of said contracts, * * * which now rest upon said Camp and Bishop, trustees as aforesaid, and were necessarily assumed by them, together with said current labor and expense account, estimated at \$4,000; amounting in all to the sum of \$83,335.41, * * * be and are, and they are hereby declared and adjudged to be, a first lien upon said railroad, railroad property and franchises, prior in right to the lien under said first mortgage, and that the title of the said petitioner, William E. Raymond, treasurer of this state, and of his successors in office, in said first mortgage, is and shall forever remain subject to said first lien on said mortgaged premises for the said several sums hereinbefore particularly specified; and that no part of the earnings of said railroad shall be divided among the holders of said first mortgage bonds, or any parties representing or claiming under them, until all and singular said obligations constituting said first lien are fully paid and satisfied; and that said first lien may be enforced against all subsequent incumbrancers, including parties claiming under said first mortgage, by a bill of foreclosure, if deemed necessary, by said Camp and Bishop, and their representatives, heirs, and assigns.

It was proved on the trial, and not denied, that the plaintiffs were in possession of the depot insured, at the time when the policy was issued, through S. N. Bacon, an employee in charge of the depot. It was also proved, and not denied, that the plaintiffs were not themselves personally, or either of them personally, in the immediate possession of the depot at the time of the fire, or for two or three days preceding the fire, and that no one who was then employed by them was in possession. But it was proved, and not denied, that said Bacon had continued in charge of the depot, in the same

manner as when the policy was issued, down to the time of the fire, except that for two or three days before the fire he was acting under the new Air Line Company and as their employee. Upon these facts the defendants requested the court to charge the jury that, to make the policy void, it was only necessary that a change should take place before the fire in the possession of the building insured, and that if the building at the time of the fire on August 18th, 1875, was not in the possession of the plaintiffs as trustees of the convertible mortgage, or if any change had taken place in the possession of the building insured after the insurance was effected and before the fire, the plaintiffs could not recover. But the court declined to give such instruction.

The jury having rendered a verdict for the plaintiffs the defendants moved for a new trial on the ground that the verdict was against the evidence in the case, and for error in the rulings of the court and in the refusal to charge as requested by the defendants.

The case was argued at a former term of the court, and re-argued at the present term by direction of the judges.

F. Chamberlin and *E. S. White*, in support of the motion.

1. The verdict was manifestly against the evidence, for the evidence proved a change of title. A condition of the policy provides that it shall be void if *any* change takes place in the *title* of the property insured by legal process or judicial decree, or voluntary transfer or conveyance. The word "property" may have different meanings, dependent upon the connection in which it is used, but in this connection, as is well settled, it is used to designate "*the thing* insured, and not the *interest of the assured* in that thing." May on Ins., § 283; *Springfield Ins. Co. v. Allen*, 43 N. York, 389, 395; *Savage v. Howard Ins. Co.*, 52 id., 505, 508; *Monadnock R. R. Co. v. Manufacturers' Ins. Co.*, 113 Mass., 77. The question therefore is, "Did any change take place in the title of the depot in any of the modes named in this condition?" The undisputed facts necessarily bring us to an affirmative reply; for, when this policy was issued, the New Haven,

Middletown & Willimantic Railroad Co. held (subject to the first mortgage to the state treasurer, and the second to the plaintiffs) *the title*—the right of property or ownership—of this depot. But before the fire, the *title* to this depot by successive processes of judicial decree and voluntary conveyance had passed from the railroad company and from the plaintiffs to the state treasurer, and from the state treasurer to the Boston & New York Air Line Co., which, at the time of the fire, held the title and ownership of the depot insured, subject only to the lien of Bishop and Camp. This condition of insurance policies has been often the subject of judicial interpretation, and in discussing it in *Savage v. Howard Ins. Co.*, 52 N. York, 506, the Court of Appeals say: "The condition found in these policies has been held, *whenever it has come before the courts*, to prohibit the sale or transfer of the property, and a change of title has been held to work a forfeiture of the policy." They add: "It is by no means a *forfeiture or penalty or in the nature of a forfeiture*. The parties have determined by their agreement the conditions of the liability and the extent of the obligations of the insurers, and they can only be held liable in accordance with the terms of the agreement and within the conditions of the obligation." And on page 508 of the same case, the court say: "It is sufficient to put an end to the policy that there has been a change in the title, and no one can say that a conveyance of the fee, and substituting the interest of a mortgagee in the property insured, is not a substantial change in the title. But the sale or transfer of the property was complete and absolute, and *the retaining a lien* for the purchase money, either in the form of a mortgage or otherwise, did not change the character or effect of the conveyance." See also *Perry v. Lorillard Fire Ins. Co.*, 61 N. York, 214; *Keeney v. Home Ins. Co.*, 3 Thomp. & Cook, 478; *Langdon v. Minnesota Farmers' Ins. Asso.*, 22 Minn., 193.

2. The verdict is also against the evidence because the evidence proved a change of possession. By the same condition of the policy a change of *possession* rendered it void. When the policy was issued, as the evidence clearly shows,

Bishop and Camp, as "trustees of the convertible mortgage," were in possession. In June following they were succeeded by the state treasurer, and before the fire he was succeeded by the Boston & New York Air Line Co., which was in possession when the fire occurred. The possession intended by the policy was the *legal* possession. If not, the policy would be avoided by every change of tenant. The foreclosure proceeding of the state treasurer, when completed, carried with it a *legal* change of possession, and the subsequent deed from him to the Boston & New York Air Line Co. also carried with it such legal change of possession. These changes of possession are clearly within the prohibition of this condition of the policy.

3. Also because the evidence proved a termination of all the interest of the assured. The fifth condition of the policy provides that the insurance shall terminate when the property has been sold or otherwise disposed of, so that all interest of the insured has ceased. The policy in suit insured "*the trustees of the convertible mortgage against loss or damage by fire, on their frame freight depot building occupied by them;*" and Bishop and Camp are not named *individually* in the policy. The decree of foreclosure cut off and extinguished all title and interest of the trustees after the fourth Saturday of June, 1875, and on that day the title of the state treasurer became absolute and perfect against all the world. By the decree a right of lien in favor of "Bishop and Camp" for expenses, advances, and services while they had been trustees, was established, and it was therein "*decreed that the payment*" of such advances, expenses, and services be "*assumed and made by the petitioner*" in said foreclosure proceedings, "to be liquidated out of the next earnings of said railroad *while in his hands.*" The court estimate the amount due Bishop and Camp, for advances, expenses, and services as trustees "*while in possession of said railroad, under said mortgage, from the 14th day of February, 1874, to the 4th day of June, 1875, and as superintendents thereof during said period,*" certain sums, amounting, including interest, to \$83,335.41, and then "*declare and adjudge the same to be a first lien*" upon

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the property. Their lien is *created* by this decree, and did not exist before; it consisted of a variety of items, of such nature that the trustees had an equitable claim upon the estate for their payment and reimbursement; and the court, in the foreclosure proceedings, adjudicated upon those claims, and found that they had such equity as was a proper basis for decreeing in favor of Bishop and Camp a lien upon the estate. As trustees their work is done and their accounts settled, and possession is to pass to prior mortgagees. The decree does not authorize the trustees or Bishop and Camp personally to take possession of the property and manage it and *work out* this lien, but the amount is "to be paid *while it shall be in their possession*, by the parties who, *by the change of title*, are to become the owners of the estate." As to a termination of the interest of the insured, the legal effect of the decree is the same as it would be had all the respondents voluntarily released to the first mortgagee all their rights and interest in the road, and the first mortgagee had then in some proper legal way given to Bishop and Camp individually security for the amount of their advances.

4. The court erred in admitting, against the defendants' objection, evidence of the agent's custom, when there was a change in the title of property insured, to notify the parties that a transfer of the policy was necessary. Such evidence was irrelevant and inadmissible, for custom cannot be given in evidence to vary or control an express contract. 2 Greenl. Ev., § 252, note, and cases there cited; *Mutual Safety Ins. Co. v. Hone*, 2 Comst., 241, 244. In the case of *Burger v. Farmers' Mutual Ins. Co.*, 71 Penn. S. R., 422, where the charter of the company contained a clause similar to the one under consideration, the court held that evidence tending to show a custom on the part of insurers to permit such transfers to be made, was immaterial. In *Stebbins v. Globe Ins. Co.*, 2 Hall's Superior Ct. R., 632, the defendants offered evidence of a usage on the part of persons insured, to give notice of any increase of risk, and it was held inadmissible to control the legal effect of the policy.

5. The court erred in admitting, against the objection of

the defendants, evidence of the plaintiffs' purpose in insuring the building. This evidence was wholly irrelevant, for the plaintiffs' rights upon this contract of insurance were fixed by the terms of the policy, and could not be varied by their motive or purpose in procuring it.

6. The court should have charged the jury, as to the effect of a change of possession, substantially as claimed by the defendants. By the first condition of the policy any change in title or possession rendered it void. The plaintiffs claimed that there had not been any change of title within the meaning of this condition, because of the lien fixed by the foreclosure decree. The facts proved and not denied clearly showed that there had been a change of possession. And the object of this request was to have the jury instructed that the policy was rendered void, and the plaintiffs' right of recovery defeated, by a change of possession only. In the case of *Keeney v. Home Ins. Co.*, 3 Thomp. & Cook, 478, one partner brought an action to dissolve the firm, and was himself appointed receiver; upon a loss occurring before a sale was made, it was held to be such violation of a condition, similar to the one under consideration, as released the insurers. That was a mere change of possession from a partnership to one partner as receiver.

S. E. Baldwin, contra.

1. The plaintiffs had a two-fold relation to the property: *first*, a mortgage title, vested in them on a naked trust for the second mortgage bondholders; and, *second*, a lien for their own benefit, by virtue of services rendered and advances made in the administration of their trust. They could insure themselves in either or both of these relations. *Carruthers v. Sheddon*, 6 Taunt., 14, 17, 19; *Holbrook v. American Ins. Co.*, 1 Curtis C. C., 193, 199. It was the latter interest which the insurance was designed to protect—an interest unimpaired at the time the suit was brought. The defendants' agent, in drawing up the policy, has indeed failed to express this object with precision. On any theory of the case, the description of the subject matter insured is obviously

inexact. The building was owned by the railroad company, subject to a first mortgage to the state treasurer, and a second mortgage to the plaintiffs, as trustees, and also to their own equitable lien. The mortgagee has a mere lien on the mortgaged property, and a second mortgagee a mere lien on the equity of redemption in the mortgaged property. *Colwell v. Warner*, 36 Conn., 234. In no ordinary sense, therefore, could the depot in possession of Bacon, under the plaintiffs, be called, as it is in the policy, "their frame freight depot building, occupied by them." But what both the plaintiffs and defendants really intended to insure, and to describe in the policy, was the lien of the plaintiffs, acquired while trustees, and by virtue of their acts as such, upon the depot building, which they claimed to be a first lien. In this view the depot might well enough be termed "theirs;" and so both parties agreed to treat it in the policy. *Peck v. New London Mut. Ins. Co.*, 22 Conn., 575, 585; *Clinton v. Hope Ins. Co.*, 45 N. York, 454, 461. The language of the policy, which follows this descriptive part, confirms this view: "And the said company hereby agrees to make good unto the said insured, their *executors, administrators and assigns*, all such loss or damage, not exceeding in amount the sum insured, nor the *interest of the assured in the property*, except as herein provided, as shall happen by fire to the property so specified." It was not an insurance for the benefit of the trust estate, but for the parties then holding the trust estate, and to whom the trust estate was indebted; otherwise the policy would have run to the plaintiffs and their successors in the trust, not to the plaintiffs and their "executors, administrators and assigns." The premium, even, does not appear to have been paid out of the trust estate. If the loss had been paid when due, the plaintiffs would have appropriated the money, at once, to re-imburse themselves. Our declaration sets up this lien as what we meant to insure. In it we say that they, "as such trustees, had *an interest* by virtue of said mortgage, *and their services, acts and claims as trustees under the same*, in and to all property covered by said mortgage; * * and the plaintiffs say that they applied to the defendants to insure

said building, *and their interest therein*, against fire; and that the defendants had full notice then and there of all the matters aforesaid, and agreed to give such insurance to the plaintiffs as trustees, * * and *did insure the plaintiffs, therein described, &c.*" The verdict is right if these allegations were justified. Indeed, were it necessary, the words "trustees of the convertible mortgage, &c.," should be held to be a mere *descriptio personæ*. This equitable lien, which both parties understood the insurance was to cover, was never alienated or discharged, until after the loss, and after this suit was begun. Like the policy, it was in favor of the plaintiffs, their executors, administrators and assigns, a vested estate, defeasible only by full payment under the decree, and a release deed duly executed.

2. But even were it true that the parties intended to insure the trustees for the sole and direct benefit of the trust estate, and that their interest or title, alluded to in the policy, was simply their necessary legal interest or title under the mortgage, the evidence would still show no such change of title as could defeat the policy. Such a change must be a change in the *plaintiffs'* title. If a mortgagee insures his interest, no sale of the property by the mortgagor can affect the insurance. But the title of the plaintiffs was improved, rather than impaired, by the decree of foreclosure; and the acquisition of a superior title is not such a change as the condition in the policy contemplates. All parts of the policy must be construed together, and, thus taken, the fifth condition qualifies and explains the more general language of the first. The *letter* of the first condition would avoid a policy in favor of an owner of mortgaged property, if he were to pay up the mortgage, and thus change his title by disencumbering it; but its *spirit* could not be, as the fifth condition clearly shows, by providing that the policy shall be avoided "when the property has been sold and delivered, or otherwise disposed of, *so that all interest* or liability on the part of the assured herein named has ceased." If the terms of these two conditions cannot thus be reconciled, then that of the fifth, being that least favorable to the party which dictated

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the policy, must prevail. And actually there was no time when "all interest on the part of the assured" ceased. The only thing affecting their title was the foreclosure. This did not take effect until June 26th, 1875, and on June 4th the lien of the plaintiffs for their services, advances, &c., was decreed to be "a first lien, prior in right to the lien under said first mortgage." From June 4th to June 26th therefore, they had two liens; but after June 26th they retained, under any view of the case, at least one, and that the first lien. Not only was the lien, which they had before claimed, now allowed by a competent court to be good against all parties in interest, but their title was distinctly declared to be superior to the foreclosure title of the state treasurer. The reason of providing for an avoidance of a policy if the title is changed, is because impairing one's title impairs his interest in preserving the property from risk. But where the title is changed for the better, neither the reason nor the condition can apply. The title of the plaintiffs, at the time of the fire, was an "absolute title," since they could not be deprived of it without their consent, and it rested on a final judicial decree. *Hough v. City Fire Ins. Co.*, 29 Conn., 10, 20. The terms of the indorsement in large type, on the back of the policy, in regard to the form of assignments of the policy, also go to show that the term "transfer of title" was regarded as importing an "actual sale." *Stetson v. Mass. Mut. Ins. Co.*, 4 Mass., 330; *Strong v. Manufacturers' Ins. Co.*, 10 Pick., 40, 44; *Van Deusen v. Charter Oak Fire Ins. Co.*, 1 Rob. (N. Y.), 55, 64; *Hoffman v. Aetna Ins. Co.*, 32 N. York, 405, 415; *Phoenix Ins. Co. v. Lawrence*, 5 Metc. (Ky.), 9, 16; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill., 168; *Power v. Ocean Ins. Co.*, 19 Louis., 2, 28; *Ayers v. Hartford Fire Ins. Co.*, 17 Iowa, 176, 184; *West Branch Ins. Co. v. Helfenstein*, 40 Penn. S. R., 289; *Burnett v. Eufaula Home Ins. Co.*, 46 Ala., 11, 14; *Bragg v. N. England Mut. Fire Ins. Co.*, 25 N. Hamp., 289. If a pledge by a married woman is held not to be a "transfer" under our statute (Gen. Stat., p. 187, sec. 4,) this foreclosure decree cannot amount to one. *Robertson v. Wilcox*, 30 Conn., 426, 431; *Padbury v. Garlick*, id., 384.

3. There was no such change of possession as can defeat the policy. The building remained throughout in the actual possession of Bacon, the local freight agent, and was used in the same way from the date of the policy to the fire. The object of this condition in fire policies is to prevent a change of occupancy which increases the risk. This is fully expressed in the first part of the first condition, which provides for the avoidance of the policy if the insured "premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, and so remain for more than thirty days," &c.; and this language qualifies and limits the generality of the subsequent provisions as to "any change" in possession. As the actual possession of the depot remained always in the hands of Bacon, it was immaterial what representative of the owners of the road had the nominal possession of the road as a whole, at the time of the fire. *Commonwealth Ins. Co. v. Berger*, 42 Penn. S. R., 285; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.), 9. The plaintiffs were recognized by the first mortgage trustee as in possession on July 8th, nearly two weeks after the foreclosure. They themselves regarded the control of the road as in their hands at this time, and Raymond as nominally in possession by their license. The defendants knew, when the policy was issued, that the parties claiming under the first mortgage had *prima facie* an immediate right to dispossess the insured. *Washington Ins. Co. v. Hayes*, 17 Ohio S. R., 433, 437. We submit, also, that the change in title or possession, meant by the policy, is limited to a change in three ways, two involuntary and one voluntary; namely, first, by legal process; second, by judicial decree; third, by a voluntary transfer or conveyance. The two latter ways seem only appropriate to a change of *title*; the word "conveyance" explaining the word "transfer" as meaning a written transfer. *Robertson v. Wilcox*, 36 Conn., 429, 431. If this construction be correct, then, as the decree of foreclosure did not provide for any change of possession, and as the plaintiffs were not ejected by any legal process, nor ever made any voluntary written transfer or conveyance, there was no change of possession within the

terms of the policy. *Insurance Co. v. Slaughter*, 12 Wall., 404. But, if we were to assume that a voluntary transfer of possession, by word or act, would be enough to defeat the policy, the jury were justified in finding that there was no such transfer by the plaintiffs. This they must have found, because they were distinctly charged that if the plaintiffs "voluntarily went out of possession, and consented to yield up the possession of the depot to the new company, then this would be a change of possession which would be sufficient to defeat their recovery." A verdict for the plaintiffs, after this charge, necessarily imports a finding that they did not voluntarily transfer the possession. Even if, again, an involuntary change of possession, otherwise than by legal process, could defeat the policy, such a result could not follow until the plaintiffs had had a reasonable time to re-possess themselves. And this reasonable time, the jury have found that the plaintiffs did not have. *Hough v. City Fire Ins. Co.*, 29 Conn., 10, 24; *Boynston v. Farmers' Ins. Co.*, 43 Verm., 256, 260. The charge on the point of possession, which the defendants requested, was plainly improper, and therefore rightly refused. A momentary change of possession, by which it was lost one day and regained the next, would avoid a policy under the law as thus claimed, although the parties insured might have used all diligence to re-instate themselves in possession, and have been in possession at and long before the time of the fire. Both these conditions as to changes in the title or possession are provisions for forfeitures, and should be construed strictly against the framers of the policy. *Boon v. Aetna Ins. Co.*, 40 Conn., 586; *Brink v. Merchants' & Mechanics' Ins. Co.*, 49 Verm., 442.

4. The question is not whether this court might upon the evidence have reached a different conclusion from that of the jury. The verdict cannot be set aside unless manifest injustice has been done, and the wrong is so plain and palpable as to exclude all reasonable doubt of its existence, and clearly to denote that some mistake has been made by the jury in the application of legal principles, or to justify the suspicion of corruption, prejudice, or partiality. *Waters v. Bristol*, 28

Conn., 404; *Daley v. Norwich & Worcester R. R. Co.*, id., 591. The fact that Mr. Bishop, who was the superintendent of the road when the policy was issued, and in possession of it by appointment of himself and Mr. Camp as co-trustees, continued in possession after the foreclosure, nominally and by a species of legal fiction as a co-agent with Mr. Camp of the state treasurer, impaired no right of the defendants. The risk was not increased, nor the use changed, nor the possession of the depot-agent interfered with, at any time before the fire. The title of the plaintiffs, and their right to reimbursement for those advances which led them to insure, were strengthened by the foreclosure decree. The new company came in two or three days before the fire indeed, but the plaintiffs' lien and right to regain their possession remained in full force. The defendants have met precisely the loss, the risk of meeting which was the consideration of the insurance premium. It would be "manifestly unjust" if they evaded paying for it. This is peculiarly a case for applying the rule that granting a new trial is a matter of discretion, and will never be done where the verdict is consistent with the justice of the case. *Johnson v. Blackman*, 11 Conn., 358; *Stone v. Stevens*, 12 id., 226; *Sheldon v. Conn. Mut. Life Ins. Co.*, 25 id., 207, 223.

5. The evidence of the custom of the defendants to notify parties insured, in case of a change of title, that there must be a transfer of the policy, was not irrelevant. If there was such a custom the plaintiffs were entitled to rely on it, provided it was universal. The charge of the court carefully limited the effect of the evidence. Mr. Fowler was the general agent of the defendants, and his custom when acting in their behalf, if of the character thus required by the charge, was the defendants' custom. *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Franklin v. Atlantic Fire Ins. Co.*, 42 Misso., 459. And such a custom, if found by the jury to have existed, of itself justified the verdict. *Leslie v. Knickerbocker Life Ins. Co.*, 2 Hun, 616.

6. It was not irrelevant to show the purpose for which the plaintiffs insured the depot. Insurance by trustees,

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factors, or other representatives of third parties, must generally be explained by similar testimony, to secure the full benefit of the policy. Had the convertible mortgage been fully paid off before the fire, or had there been a change of trustees under the second mortgage, the plaintiffs would still have retained an insurable interest by reason of their advances and services. The second mortgage on this road was practically worthless, the property being notoriously insufficient to satisfy the first. The real gist of the transaction was an insurance of the plaintiffs' lien on the depot for their advances and services. *King v. State Fire Ins. Co.*, 7 Cush., 7; *Waters v. Monarch Ins. Co.*, 34 Eng. L. & Eq., 116; *De Forest v. Fulton Fire Ins. Co.*, 1 Hall, 84; *Lee v. Adsit*, 37 N. York, 89; *Globe Ins. Co. v. Boyle*, 21 Ohio S. R., 128; *Insurance Co. v. Chase*, 5 Wall., 509. This was the ground of recovery which we declared on. If the defendants thought it variant from the policy, they could have demurred; but they cannot prevent us from proving our allegations under the general issue. *Adams v. Way*, 32 Conn., 160.

PARDEE, J. This is an action upon a policy of insurance against loss by fire. The plaintiffs had a verdict; the defendants filed a motion for a new trial for alleged errors on the part of the court in the admission of evidence and the refusal to charge as requested; also a motion for a new trial for a verdict against evidence. The plaintiffs have filed a bill of exceptions (under the statute) based upon the refusal of the court to charge the jury that the decree of foreclosure hereinafter mentioned did not work any such change in the title of the plaintiffs as can impair their rights under the contract.

In 1874 the holders of the convertible bonds issued by the New Haven, Middletown & Willimantic Railroad Company, and secured by a second mortgage, were in the possession and use of the real and personal property of that corporation, and were operating the road through the agency of George H. Bishop and John N. Camp, the plaintiffs, who were the successors of the persons named as trustees in the mortgage deed; and, in particular, were in the possession and use of the freight depot in Middletown.

On December 17th, 1874, these trustees obtained insurance against loss by fire from the defendants; the contract containing the following words: "do insure the trustees of the convertible mortgage of the New Haven, Middletown & Willimantic Railroad Company against loss or damage by fire to the amount of \$2,000, for the period of one year, on their frame freight depot building occupied by them and situated near the corner of Main and Spring streets in the city of Middletown, Ct."

In May, 1875, the holders of another series of bonds issued by the railroad company, and secured by the first mortgage upon its property, obtained a decree of foreclosure upon a petition in which the corporation, the holders of the convertible bonds, and all other persons having any interest in the property, were made respondents. These were to redeem on or before the fourth Saturday of June, 1875, or be forever thereafter barred and foreclosed. They did not redeem; and the treasurer of the state of Connecticut, who had been named as trustee in the mortgage deed, in behalf of the *cestuis que trust*, took possession of said property, including said freight building, and for their benefit operated the road, appointing the plaintiffs as his agents in executing his trust, until July 8th, 1875, when he conveyed the property by deed to the Boston & New York Air Line Railroad Company; the General Assembly of this state having at its May session, 1875, incorporated by that name the bondholders for whom he held the trust. Thereupon the last named corporation went into the possession and use of said property, including said building, and for itself operated the road; the agency of the plaintiffs in respect to the road ceasing on August 1st, 1875. This freight building was destroyed by fire on the 14th day of August, 1875, at which time it was in charge of an agent appointed by the Boston & New York Air Line Railroad Company.

The contract of insurance upon which this suit is brought provides in the first section that "if the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree or voluntary

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transfer or conveyance, * * this policy shall be void;" and in the fifth, that "when property has been sold and delivered or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate." When the policy was executed, the New Haven, Middletown & Willimantic Railroad Company held the equity of redemption subject to the two mortgages; bondholders secured by the second mortgage, under an arrangement with those secured by the first, were in the actual possession and use of the building; the contract was to insure it as their property; before the loss occurred a judicial decree extinguished the title previously held thereto either by the railroad company or the convertible bondholders; title, right to possession, and possession, had passed to the first bondholders, and from these last by voluntary conveyance to a new corporation; and this without notice to or consent of the defendants. Precisely that had occurred which both parties had stipulated should make void the contract of insurance. As a general law governing human conduct, owners of property are presumed to use some degree of care in protecting it; the insurers made this law their ally by providing that during the life of the policy the insured should preserve some right in or to the property, and thus be interested in guarding it from destruction by fire; when the judicial decree entirely divorced them from it, its preservation or loss became alike immaterial to them. Thus, the vital condition of the contract was broken, and the court should have instructed the jury that, the foregoing facts being proven, the plaintiffs were not entitled to maintain their action; and this, irrespective of the fact that the insurers knew when they issued the policy that the insured were second mortgagees. The willingness of the defendants to insure the plaintiffs in their qualified equitable interest does not bind them to stand as their insurers when they have ceased to have any interest at all.

After the holders of the second mortgage bonds had taken possession of the property, the plaintiffs, being successors of the trustees named in the mortgage, managed the road; while

performing this service, they as individuals advanced money and assumed obligations for its protection and maintenance to the extent of more than eighty thousand dollars. In the decree of foreclosure hereinbefore mentioned this indebtedness was recognized, and by agreement between them and the other parties in interest payment thereof was secured by making it a lien upon the property to take precedence of the first mortgage, to be discharged from the first earnings of the road. Accepting the claim of the plaintiffs that their advancements became as matter of law the first lien upon the property from the moment they were made, such lien was to them in their individual capacity; their interest as lienors was wholly distinct in origin from that of the convertible bondholders; either one could have been destroyed without affecting the other; and we are unable to find in the language of the contract insuring the title of "the trustees of the convertible mortgage of the New Haven, Middletown & Wilimantic Railroad Co.," inclusion of or protection for any interest which the plaintiffs as individuals might have had in the building. Moreover, they made their advancements solely upon the credit of the property in their keeping, and not at all upon the personal credit of the unknown and ever changing body of holders of coupon bonds transferable by delivery; these had assumed no personal obligation to them; and when these were foreclosed and barred from all ownership the plaintiffs followed the property, and obtaining from the court a first mortgage of record thereon, accepted that as the security for their loan; from that time onward these foreclosed bondholders not only had no right, title or interest in or to the property, but no responsibility for the plaintiffs' personal advances; it was quite immaterial to them when or how these were repaid; for being repaid the first mortgagees had the property; and not being paid the plaintiffs as individuals took it. The second bondholders had no insurable interest remaining in them.

Again, the plaintiffs argue that parol evidence is admissible for the purpose of showing that they insured their individual, personal interest in the building, upon the principle that

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trustees, factors, and other representatives of third parties, must thus explain, in order to secure the benefit of their policies.

Whenever insurers take risks upon property in the keeping of a factor without requiring the name of the owner, or in the possession of a trustee without requiring the name of the *cestui que trust*, or an interest in a representative name without a specific description as to the ownership, they contract to subject themselves to the admission of parol evidence for the purpose of determining the person to receive indemnity if loss occurs. But, in the case before us the defendants did not insure the plaintiffs as trustees in general terms and leave to parol evidence to point out the *cestui que trust*; they required and received an explicit declaration from the plaintiffs that they desired the insurance in their capacity as trustees for the convertible bondholders, and that it was the interest of these last in the property which they sought to protect; and the plaintiffs accepted the contract wherein it was thus written, written with such particularity and distinctness as to give no place for doubt. The parol evidence offered for the purpose of eliminating from the contract the name of the party for whose benefit it was expressly made and substituting another, should have been rejected.

Upon the trial the plaintiffs offered evidence for the purpose of showing that it had been the custom of the agent who issued the policy to notify, in behalf of the defendants, persons insured that a change of title would necessitate a transfer of the policy, and that this had been inadvertently overlooked in the present case. The defendants objected, but the court admitted it. The agent testified that he had acted for the defendants from the summer of 1874 to the close of 1875, but could not mention an instance of such notice. This evidence falls short of establishing the existence of a custom having the qualities of uniformity and universality in the degree necessary to enable it to support the presumption that this contract was made in subservience to it, and to override precise written stipulations. The verdict based upon it must be set aside.

A new trial is granted.

In this opinion PARK, C. J., and LOOMIS, J., concurred. CARPENTER and GRANGER, Js., dissented.

CARPENTER, J. I am not able to concur in the conclusion to which a majority of the court have come in this case.

The property insured by the policy upon which this suit is brought formerly belonged to the New Haven, Middletown & Willimantic Railroad Company. All the property of the company was subject to two mortgages, the first to the state treasurer to secure certain bondholders, and the second to trustees to secure other bonds called convertible or second mortgage bonds. The trustees took possession of the road and all its property under the second mortgage. The policy in suit was issued to the trustees in December, 1874, by which the freight depot in Middletown was insured. At that time the trustees were operating the road nominally for the benefit of the second mortgage bondholders. In June, 1875, the first mortgage was foreclosed. That decree extinguished the right of the bondholders under the second mortgage, but the claim of the trustees for expenses incurred in operating the road, making repairs, &c., was not foreclosed. It was agreed by all parties interested that such expenses, amounting to over \$83,000, should be regarded as a lien upon all the property of the company, and should take precedence of the first mortgage, and it was so provided in the decree. After the decree became absolute the state treasurer took possession of the road in the interest of the holders of the first mortgage bonds, and appointed the plaintiffs to superintend and manage its affairs. On the 8th of July, 1875, the road and all its appurtenances were sold to the Boston & New York Air Line Railroad Company. The plaintiffs continued to manage the road until August, when, without their consent, and without their previous knowledge, they were displaced and one Turner was appointed superintendent. A few days later, August 14th, 1875, the building insured was totally destroyed by fire. Upon these facts the jury returned a verdict for the plaintiffs. The defendants insist that the verdict should be set aside, as

being against the evidence in the cause, for two reasons, first, that the evidence shows that there had been a change of title to the property, and second, a change of possession; either of which it is claimed rendered the policy void.

Let us examine those reasons.

1. Title. It is not denied that the plaintiffs at the time the policy issued had an insurable interest in the property insured. We will notice particularly what that interest was, and that will assist us in determining whether there has been any change. They did not insure as individuals, but as trustees. As such they had the possession and use of the road and all its property, including the depot building, insured. All the receipts and income from the property constituted a fund in their hands, which they held in trust, not merely for the holders of the convertible bonds, but for other purposes. There are three classes of creditors who have a possible interest in this fund:—1st. Those having claims for expenses and repairs. 2d. The holders of the first mortgage bonds; and 3d. The holders of the convertible bonds. These do not stand upon an equal footing. The first must be paid in full before anything can be paid to the second or third; and the interest on the first mortgage bonds must be paid in full before anything can be paid on the second mortgage bonds. Inasmuch as, during the lifetime of this policy, the expense account exceeded the entire income by more than \$83,000, it is obvious that neither class of bondholders had any real interest in this fund, for the reason that it was not sufficient to reach either class. The plaintiffs, therefore, in reality, were trustees for the first class alone; and the insurance in the interest of this fund is really in the interest of these creditors. Thus it will be seen that these plaintiffs represent parties entirely distinct from either class of bondholders, and are not in reality trustees for the bondholders at all so far as this fund is concerned or this insurance. The parties represented by the plaintiffs are entitled to a priority in point of right, not only in the income of the trust property, but also, in equity, in the trust property itself. This right was distinctly recognized by the first mortgagees, and it was

provided in their decree of foreclosure that these claims should be a first lien upon the entire property.

The plaintiffs therefore, as trustees in a limited or qualified sense, as above explained, might with propriety insure this building for the benefit of those claims; but if otherwise, and they are to be regarded as trustees in a broader sense—representing the bonds as well as these claims—still the result would be the same. The extinction of the claims of the mortgagees will not vitiate the insurance so long as the claims of other parties remain good. Whether the insurance money when collected is payable to one person or another is a matter of no concern to these defendants.

My conclusion therefore is that the interest or title of the plaintiffs remained at the time of the fire substantially as it was at the time the policy issued.

Another inquiry in this part of the case is, whether any change of title in other parties concerned will vitiate the policy.

There are two clauses in the policy which should be considered in this connection. The first is found in the first condition, and reads as follows:—"Or if the property be sold or transferred, or any change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance, this policy shall be void." I think this clause has reference to the thing insured; whether it is the property itself, as where the insured has the absolute title, or an interest in the property less than a complete title. In either case the insurance, if the property insured, whatever it is, is sold, or if in any other manner the insured is divested of his title, becomes void. In the present case no such change has taken place.

I think this clause has no reference to any title or interest which other parties may have in the property. If so no change in such title or interest will operate under this clause to defeat the policy. In respect to possession it may be different, especially if the change of possession materially affects the risk.

The second clause is in the fifth condition, and is as fol-

lows:—"If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the sole use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void. When property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate." This whole section taken together seems to have a direct application to the present case. The interest of the assured in the property is less than the "entire, unconditional and sole ownership;" and by clear implication any conveyance or disposition of the property, which does not terminate the interest of the assured, does not affect the policy. There has been no conveyance or disposition of this property which impairs the interest of the plaintiffs. There is nothing therefore in this provision of the policy which makes it void.

2. Was there a change of possession? The plaintiffs remained in possession as trustees until June, when the state treasurer took possession under the first mortgage. He appointed the plaintiffs his agents to operate the road, and as such they were in possession until July 8th, when the road was sold to the Boston & New York Air Line Railroad Company. After the sale they continued operating the road as before until August. Early in August they were displaced and one Turner was appointed superintendent in their stead, but without the knowledge or consent of the plaintiffs. In a few days after this change was made the fire occurred.

The instruction to the jury was of such a character that they found, and I think, upon the evidence, properly found, that the possession of the plaintiffs under the state treasurer and under the new corporation, was a continuance of their possession, or at least that it was not such a change of possession as affected the policy. Mr. Camp, one of the plaintiffs, testified as follows on this point:—"Our possession as trustees under the convertible mortgage ended, I should say,

in June, 1875. Bishop was superintendent afterwards. He kept on. After we ceased to hold as trustees we acted for Mr. Raymond, state treasurer. I held on till early in August, 1875. I think I left Bishop in charge as superintendent when I left on my vacation. * * *

By general arrangement Bishop and I were to act as agents of the state treasurer in operating the road. * * *

We kept running the road as we had done. I don't know whether we acted as agents or trustees. * * *

The funds were kept in my name as agent while we acted for the state treasurer. Before they were kept in my name as trustee. There was no other change when we acted for him, no change in the general management, none in the books."

Taking all this evidence together I think he meant that their trusteeship for the holders of the second mortgage bonds ended in June. Their interest as trustees in respect to the expense account manifestly continued. I think it is equally clear that they did not intend to relinquish any security they held for the payment of those claims. The jury therefore might fairly presume that they intended to retain possession to protect their interests in that behalf. There was no conflicting evidence and I think the action of the jury cannot be complained of.

In respect to the appointment of Turner as superintendent, the jury were told "that if they found that the plaintiffs were unlawfully and forcibly displaced by the Boston & New York Air Line Railroad Company, and were thus temporarily put out and kept out of possession of the depot by force and against their mind and will, their remaining out of possession for a short time would not necessarily make them out of possession within the meaning of the policy; but that if they voluntarily went out of possession, and consented to yield up the possession of the depot to the new Air Line Company, then this would be a change of possession which would be sufficient to defeat their recovery."

Under this charge the jury must have found that the plaintiffs were "temporarily put out and kept out of possession of the depot, by force and against their mind and will."

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There was some evidence at least to support this finding, and there was little or none to show that they "voluntarily went out of possession, and consented to yield up the possession, &c." Mr. Camp testified thus:—"Bishop and I were not consulted in advance and my consent not given to the displacement of Bishop by Turner. I was not asked about it and Bishop was not so far as I know." Again, on the cross-examination he says:—"I did not know but I should take possession, for when we gave up possession I understood from my counsel that we could get possession again any time in twenty-four hours." This clearly indicates not a voluntary but involuntary giving up of possession. The fact that they thus consulted counsel in respect to their rights is significant. On the whole I am inclined to think that the jury under this instruction came to a correct result.

I am also inclined to the opinion that the court below correctly charged that an unlawful and forcible displacement of the plaintiffs, under the circumstances, did not terminate the policy. They were certainly entitled to a reasonable time in which to reinstate themselves, and I think we cannot say that there had been any unreasonable delay.

Moreover, Mr. Bacon, the man who was in the actual charge of the depot, had the charge and control of it from the time the policy issued until the building was destroyed. It is apparent therefore that the nominal change of possession did not increase the risk, and that the objection to a recovery now urged is purely technical.

It is further objected that the plaintiffs cannot recover because of their personal claims; and it is suggested that their interest as trustees has been converted into a personal interest. That is not, as I regard it, a correct view of the case. The facts show that a small part of the expenses of the trustees was for personal services and advancements. A large portion of it, exceeding one-half, was for liabilities incurred and assumed, and not paid when the decree was passed, in June, 1875; and there is no evidence that they had been paid at the time of the fire. Now if it be assumed that the plaintiffs cannot hold this policy as security for their

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personal claims, still their liability to other parties continues, and that keeps alive their trusteeship, and their official interest in the policy.

But aside from that I think there is no force in this objection. When the fire occurred the plaintiffs, as trustees, were owing \$83,000. This policy then became a claim, and was a part of the assets in their hands to be applied in payment of that indebtedness. A part of that indebtedness was due to themselves personally and a part to other parties. I think they are entitled to collect this policy; and when collected, whether paid to one creditor or to another, to themselves personally or to others, can make no possible difference.

In this opinion GRANGER, J., concurred.

CITY OF HARTFORD vs. WEST MIDDLE DISTRICT.

Under the charter of the city of Hartford all land specially benefited by a city improvement is liable to be assessed for the expense of such improvement. Held that a piece of land owned by a school district, upon which its school-house stood, and which was used solely for school purposes, and of which no other use was contemplated in the future, was not so benefited that it could be assessed for the expense of a street laid out by the city near it.

To render an assessment of benefits legal, it must appear that the benefit is direct and immediate, not contingent and remote.

DEBT, to recover the amount of an assessment for the expense of the laying out of a city street, near to a school-house of the defendants, an incorporated school district of the town of Hartford. The action was brought to the Superior Court in the county of Hartford, and tried to the court before *Hovey, J.*, who made a finding of the facts and rendered judgment for the plaintiffs. The defendants brought the record before this court by a motion in error. The case is sufficiently stated in the opinion.

G. G. Sill, with whom was *E. Johnson*, for the plaintiffs in error.

C. R. Chapman, for the defendants in error.

GRANGER, J. The principal question presented by this record is, whether a school district is liable to assessment for benefits to its property by the laying out of a street or highway. If this question is determined, as we think it must be, in favor of the defendants in this case, a consideration of the other questions made becomes unnecessary.

The Superior Court finds that the "assessment was made upon the defendants, because they were the owners of property in said city, which in the opinion of the board of street commissioners was specially benefited by the laying out of said new highway or street. Said property consisted of a lot of land, with a school-house thereon, which land the defendants purchased in 1872, as a site for said school-house, at a cost of \$35,000, and took a deed thereof in their corporate name, and in 1873 erected said school-house, at an expense of \$118,844. The defendants used the whole of said land for school district purposes, and cannot maintain the public schools, which they are required by law to maintain, and provide them with sufficient and convenient accommodations without it. The said school-house was designed, built and fitted up for school purposes only. For those purposes exclusively it has been used ever since it was completed, and it is adapted to no other purpose or use. Moreover it is centrally located and accommodates all the inhabitants of the district."

This was the condition and character of the property at the time the assessment was made, and at the time the street was laid out. How could the defendants, as a school district, be benefited by the laying out of the street? The assessment was undoubtedly made upon the idea that the intrinsic value of the property was increased, but, if that were so as a matter of fact, does it follow that it was increased in value as school district property, bought and used solely for school purposes, and did the district, or could it from the nature of things, derive any immediate, direct or special benefit from the laying out of the street? We are unable to see how the district as

a corporation could be so benefited, or that their property was rendered any more valuable for the purpose for which they use it, and for which they must continue to use it, if not for all time, at least for a very long period.

To render the assessment of benefits legal and valid, it must appear that the benefit is direct and immediate, and not contingent and remote. *City of Bridgeport v. New York & New Haven Railroad Co.*, 36 Conn., 255; *New York & New Haven Railroad Co. v. City of New Haven*, 42 Conn., 279.

We think there is manifest error in the judgment of the Superior Court, and it must be reversed.

In this opinion the other judges concurred; except CARPENTER, J., who did not sit.



THE STANLEY RULE & LEVEL COMPANY vs. LEONARD BAILEY.

The plaintiffs entered into a contract with the defendant, under which they were to have the exclusive right to manufacture and sell various articles under numerous patents owned by him, the right to continue during the life of the patents and any extension of them, and they to pay him a royalty on all the articles sold, the defendant agreeing to defend them against all parties claiming a right to use the patents. Certain of the patents expired and were not renewed by the defendant, but the plaintiffs not being aware of the fact, but believing them in force, went on paying the royalty upon articles made under them, the defendant receiving the money in the belief that he was entitled to it under the contract. In a suit to recover back the money so paid, it was held—

1. That under the contract the defendant was not entitled to a continuance of the royalty until all the patents had expired, but only to receive it on the articles manufactured under the patents that had not expired.
2. That if the money was paid in ignorance of the fact that the patents had expired, the plaintiffs were entitled to a repayment of it.
3. That the fact that the plaintiffs had the means of informing themselves by enquiry of the defendant, was not sufficient to charge them with knowledge; it being a case where they might reasonably expect the defendant to inform them.
4. That the payment after they had knowledge, of the royalty on articles manufactured under the unexpired patents, did not constitute a waiver of their right to demand back the money paid as royalty on articles manufactured under the patents that had expired.

ASSUMPSIT, to recover back money claimed to have been paid under a mistake of facts; brought to the Court of Common Pleas of Hartford County. The facts were found by a committee, and on the facts the court (*McManus, J.*) rendered judgment for the plaintiffs. The defendant brought the record before this court by a motion in error. The case is sufficiently stated in the opinion.

G. G. Sill, for the plaintiff in error.

C. E. Mitchell, for the defendants in error.

PARK, C. J. We think the finding of the court below, that the money sought to be recovered in this suit was paid by the plaintiffs to the defendant through misapprehension of the facts with regard to their obligation to pay it, is decisive of the case. It is conceded that the plaintiffs are entitled to recover a part of the amount, and we think it is equally clear they ought to recover the whole. That part of it which is in dispute was paid to the defendant as a royalty for the privilege of manufacturing and selling certain articles, under certain patents, of which the defendant previous to this time was the owner. The money was paid according to the terms of a certain contract between the parties, wherein the defendant, for the consideration of a certain royalty to be paid on all the articles, covered by the patents, which should be manufactured and sold by the plaintiffs, granted them the privilege of manufacturing and selling them during the continuance of the patents and any extension of them. The plaintiffs manufactured and sold the articles, and paid the royalty according to the terms of the contract. In the meantime some of the defendant's patents expired and were not extended, but the plaintiffs being ignorant of the fact continued to pay the royalty as they had done before, and paid the sum which they now seek to recover on patents which had thus expired. The defendant knew that the patents had expired and had not been renewed at the time he received the money; but believing that he had the right to receive it under the contract, did not state the fact to the plaintiffs.

It further appears that the plaintiffs paid the money believing that the patents were in force, and that they would not have paid it had they known the facts. But it is said that they had the means of knowledge, and that this is equivalent to knowledge itself. There may be such full and complete means of knowledge as to be equivalent to knowledge itself, but we think this is not such a case. The defendant owned the patents. He was in the employ of the plaintiffs. The patents were on a large number of articles; and some of them were covered by two or more patents of different dates. The case was a complicated one, and required thorough examination to determine the exact fact. It would naturally be expected that the defendant would keep himself informed on the matter, and being in the employment of the plaintiffs would inform them when the patents expired. This would reasonably be expected by the plaintiffs where they had no reason to suspect dishonesty in the defendant; and we think they had a right to rely on what would ordinarily be expected under the circumstances.

It is further said that the defendant had a right to the royalty under the contract; that a true construction of it entitles him to the royalty on all the articles, so long as any of the patents are in force on any of the articles. This claim is manifestly erroneous. The right conveyed by the contract is an "exclusive right to make and vend" the articles, and it is "to continue during the life of the patents, or any extension of them." Besides which it is provided in the contract that the payment of the royalty shall be co-extensive only with the exclusive right conveyed; also that the defendant shall warrant and defend the exclusive right conveyed. When a patent expires the right to manufacture and sell the article patented ceases to be an exclusive right and becomes a general one. Now the defendant's royalty is confined to articles which the plaintiffs have an exclusive right to manufacture and sell. As that right by the expiration of one patent after another becomes general, so the royalty becomes reduced, and the obligation to warrant and defend is likewise reduced in the same proportion. These three provisions are co-extensive.

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As well might the plaintiffs require the defendant to warrant and defend their exclusive right to manufacture and sell all the articles, when all the patents had expired but one, as that the defendant should require them to pay him his royalty on all the articles manufactured in the same circumstances. Clearly there is no foundation for this claim.

It is further claimed that, whatever might otherwise be the right of the plaintiffs to repayment, they have lost the right, inasmuch as they made a voluntary payment of the royalty on articles covered by the remaining patents, after they had become apprised of the fact that they had paid the royalty on patents which had expired. This claim is made upon the idea that the last payment made the first payment voluntary, although it was not so originally. But a payment is either voluntary or involuntary at the time it is made, and nothing can occur afterwards to alter its character in this respect. As well might it be claimed, if *A* sues *B* upon a note, and *B* has a claim against *A* for work done at his request, that unless *B* sets off his claim against *A*'s demand he thereby acknowledges that he has no claim, and cannot afterwards recover it. This claim is clearly without foundation.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

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ALBERT C. RAYMOND AND ANOTHER, EXECUTORS, vs. SARAH B. HILLHOUSE AND OTHERS.

A testator made the following bequest:—"The residue of my estate I give to the following named persons, to be divided equally among them; my sisters *R* and *S*, the grandchildren of my deceased brother *W*, and the grandchildren of my deceased sisters *D* and *M*; meaning by this to include all the grandchildren living at the time of my decease." Held that the grandchildren took *per stirpes* and not *per capita*.

PETITION IN EQUITY by the executors of the will of Samuel

Hillhouse, deceased, for advice as to the construction of the will; brought to the Superior Court in Hartford County.

The clause in the will as to which the question arose, was as follows:

"*Eighth*: All the residue of my estate, real and personal, I give and devise to the following named persons, to be divided equally among them; my sisters Rachel and Sarah, the grandchildren of my brother William, and the grandchildren of my deceased sisters Delia and Mary; meaning by this to include all said grandchildren living at the time of my decease; provided that the share of Elizabeth Raymond, daughter of my deceased nephew James H. Raymond, shall be held by John Beach, of Goshen, in trust for her benefit as hereinafter provided."

There were living at the testator's decease two grandchildren of the testator's brother William, three of his sister Delia, and fourteen of his sister Mary; and the question submitted to the court was, whether these grandchildren took under the will *per stirpes* or all the legatees took *per capita*.

The case was reserved for the advice of this court.

C. E. Gross, for the petitioners.

H. C. Robinson, for the claimants *per capita*.

1. A gift to "children," or to "grandchildren," or to any class described by its members' relation to the testator, is a gift to them individually. This is especially true when the technical words "to be equally divided among them" are employed. And still more strongly so when there is any limitation of survivorship, as "to the survivors" of them, or to "such as survive," or to the "living" children or grandchildren. These propositions will hardly be disputed. They are recognized in all the text-books and in the reports. 2 Jarman on Wills, 111. In England—in *Cunningham v. Murray*, 1 De G. & Sm., 366; *Rickabe v. Garwood*, 8 Beav., 579; *Lenden v. Blackmore*, 10 Sim., 626; *Dowding v. Smith*, 8 Beav., 543; *Lincoln v. Pelham*, 10 Ves., 166, 176; *Blackler v. Webb*, 2 P. Wms., 383, which has been quoted approvingly

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everywhere as a leading case. In Ireland—in *Heron v. Stokes*, 3 Dru. & War., 89. Indeed, there is no controversy upon this principle on the other side of the ocean, and authorities to support it can be multiplied indefinitely. We have the same judicial results in this country. In Massachusetts—*Weston v. Foster*, 7 Met., 297; *Balsom v. Haynes*, 14 Allen, 204; *Hill v. Bowers*, 120 Mass., 135. In New York—*Collins v. Hozie*, 9 Paige, 81; *Murphy v. Harvey*, 4 Edw. Ch., 131; *Myres v. Myres*, 23 How. Pr. R., 410; *Seabury v. Brewer*, 53 Barb., 662. In Pennsylvania—*Bender's Appeal*, 3 Grant, 210; *Miller's Appeal*, 35 Penn. St., 323; *Fissell's Appeal*, 27 id., 55. In Connecticut—*Lord v. Moore*, 20 Conn., 126; *Gold v. Judson*, 21 id., 616; *Lyon v. Acker*, 83 id., 225.

2. But it will be claimed that this rule yields to evidence of another intention apparent in the will, even though that intention be faintly expressed. To this we reply, without controverting the principle, that there is no evidence at all in the phraseology of this document which intimates any contrary intention; on the other hand we claim that the phraseology is confirmatory of this construction. Nor can it be said that the legal principle which guards the interests of lineal descendants intervenes to obstruct the claim for which we contend. If, as is true, the law seeks to save lineal descendants from disinheritance, there are no moral or legal reasons to protect the distant collateral relatives of a bachelor testator from his exercising those preferences and partialities which such testators almost invariably feel. We do not deny that in Connecticut, as elsewhere, these rules of construction have been held subject to the commanding rule of interpreting the instrument according to the testator's intent, to be determined by all proper evidence from the instrument and its circumstances. In *Bond's Appeal from Probate*, 31 Conn., 184, the counsel for the appellees made no claim in behalf of his clients, the grandchildren, that they took *per capita*, and the court of course granted him no more than his request. The recent case of *Talcott v. Talcott*, 39 Conn., 186, was altogether peculiar. The principal ground upon which the decision rests, is that an individual division of the estate would have carried

five-ninths of it away from children to strangers. Emphasis was put by counsel for the family upon the use of the word "heirs," which our court in *Cook v. Catlin*, 25 Conn., 387, held to import in Connecticut, on account of our peculiar statutes, a distribution by classes, recognizing and affirming the early controlling case (1786) of *Kennedy v. Kennedy*, 1 Swift Dig., 115.

3. But the will expressly directs the distribution of the residue among the beneficiaries named *per capita* by its use of the word "persons." "To the following named *persons*, to be equally divided among them." The division is to be equal between the persons as if particularly named. There is perhaps no word in our language, except a numeral, which so completely individualizes as "person." It is even more individual than "individual" itself. For we speak of an individual city, but never use the word personal in that manner. The testator has thus expressed his individualization of these beneficiaries, and then ordered his estate to be divided equally among *them*. It would seem difficult to more surely describe the objects of his bounty as single persons, and their several equal portions in his will.

J. Halsey, for the claimants *per stirpes*.

The proposition contended for in this brief is, that by the eighth clause of the will the testator has named five devisees between whom the estate is to be equally divided, viz: two persons, his sisters Rachel and Sarah, and three classes of persons, the grandchildren of his brother William, and the grandchildren of his deceased sisters Delia and Mary, and that the estate should be divided into five equal portions, one of which should be distributed to the heirs of Rachel, one to the devisees of Sarah, one to the grandchildren of William, one to the grandchildren of Delia, and one to the grandchildren of Mary. In support of this proposition, we contend—

1. That the provisions of the will in question bring it entirely within the principles adopted by this court in the case of *Acker v. Lyon*, 33 Conn., 222, and the reasons given by CARPENTER, J., in that case are referred to and adopted in the

argument of this case. In that case the devise was to three daughters by name and the children of a brother, the children not being named, "share and share alike." Here the devise is to two sisters named, and the grandchildren of a brother and two sisters, the grandchildren not being named, "to be divided equally among them." The cases are parallel, except as to the degree of kindred, and the language employed to denote the portion given to each. The words "share and share alike," seem to point more decidedly to a distribution *per capita* than the words "equally among," or "equally between." *Lee v. Lee*, 39 Barb., 173.

2. The names and number of the grandchildren do not appear in the will; they are referred to only as a class, to be ascertained at a future time. The testator has expressly added what indeed the law would supply, but the addition indicates his intention, that the class shall include all living at the time of his decease. This indicates an intention to make the shares of the grandchildren of a brother or sister only equal to the share of one of his sisters.

3. There is nothing in the language of the will to indicate an intention to discriminate against his two sisters in favor of his great nephews and nieces, and the court will not presume any such intention. On the other hand the sisters seemed to be especially the objects of his bounty.

4. When the testator desired a *per capita* distribution between his nephews and nieces, children of different sisters, he distinctly and explicitly provided for such distribution. But when he makes a distribution between his two sisters and the several classes named, very different language is employed, indicating that he understood the legal effect of the language used.

5. The words "to be divided equally among them" do not affect the construction, since they may apply to a division among the classes as readily as to a division among the individuals. *Hasbrook v. Harrington*, 16 Gray, 102; *Balcom v. Haynes*, 14 Allen, 205; *Risk's Appeal*, 52 Penn. S. R., 269.

6. The testator had evidently in mind the idea of representation of a stock, though the term "heirs" is not used, for

the class embraces an uncertain body, only to be determined at his death. *Bassett v. Granger*, 100 Mass., 349.

7. It is to be inferred from the provisions of the will that the testator had neither wife nor child. His next of kin were his two sisters and brother living, and the children and grandchildren of his deceased sisters. The grandchildren would come within the rule of representation and take their deceased parents' share. If there is any doubt in regard to the construction, the statute furnishes a safe guide in this case. *Lyon v. Acker*, 33 Conn., 224; *Risk's Appeal*, 52 Penn. S. R., 271. If either of the sisters named had left issue, the inequitable effect of a *per capita* distribution would be still more apparent.

LOOMIS, J. The advice of this court is asked concerning the proper construction of the residuary clause of the will of Samuel Hillhouse, late of Wethersfield, deceased, which is as follows:—"All the residue of my estate, real and personal, I give and devise to the following named persons, to be divided equally among them:—my sisters Rachel and Sarah, the grandchildren of my deceased brother William, and the grandchildren of my deceased sisters Delia and Mary; meaning by this to include all said grandchildren living at the time of my decease; provided that the share of Elizabeth Raymond, daughter of my deceased nephew, James H. Raymond, shall be held by John Beach, of Goshen, in trust for her benefit as hereinbefore provided." And the precise question is, whether the estate should be distributed among the beneficiaries *per stirpes*, or *per capita*.

To aid in the construction we invoke, first, the paramount rule that requires us to ascertain if possible the intention of the testator from the language of the will and all the circumstances. But unfortunately the language here employed is considered so doubtful as to be made the basis of directly opposing arguments.

The counsel who contended for a distribution *per capita* claimed that the testator's use of the word "persons" was a clear individualization of his beneficiaries. But we think

this word, in the connection, may as well refer to a class of persons. The phrase, "the following *named* persons," it is true raises an expectation that the specific names of the beneficiaries are about to be given, but in this case the testator, along with the names of his two living sisters, gives the names of his two deceased sisters and of his deceased brother, whose grandchildren are to receive the legacy. Now did the testator mention the names of the deceased persons only by way of designating the individual grandchildren who were to take, or were the names thus given as the proper heads of the classes who were thus to take? The latter construction is at least as natural and reasonable as the former.

The will is silent as to the names and number of the grandchildren; they are an uncertain body to be first ascertained at the time of the testator's death, and only those then living are included.

Neither do the words, "to be divided equally among them," necessarily import a division of the property among individuals, for they apply just as readily and appropriately to a division among classes.

If now we pass from the particular clause under discussion to other parts of the will, we can find nothing inconsistent with a distribution of the residuum *per stirpes*. If we look at the clause immediately preceding we shall see that when the testator had in mind a *per capita* distribution of certain property in other states among his nephews and nieces, it was very clearly expressed, and in very different language too from that under consideration. The testator might easily in the clause we are considering have given all the residue, (following the style of the clause just referred to), directly to his two sisters and to all his great nephews and great nieces, but for some reason he preferred to name the five persons who stood nearest in kinship—two living and three deceased—the latter leaving grandchildren who were to take the estate. In so doing, we think it probable that the testator had in mind a division of the property into five parts. The will elsewhere discloses the fact that the two living sisters were the especial objects of his bounty, and we think it

improbable that he intended to make their shares as small as any one of his nineteen great nephews and great nieces.

But we are confronted with the English rule of construction, adopted in Massachusetts, New York, and some other states, that "a gift to children, grandchildren, or heirs, is equivalent to naming them and is a gift to them individually." 2 Jarman on Wills, 1st Am. ed., 111. The same author, after citing the above rule, adds, "But this mode of construction will yield to a very faint glimpse of a different intention in the context."

If the above rule is so easily set aside, it would seem equally reasonable that it should also yield to the presumption in favor of the natural heirs or next of kin, for a distribution according to the statute, in all cases where the language of the will is consistent with such a distribution, and the real intention of the testator is in doubt. And such a rule of construction was adopted by this court in *Lyon v. Acker*, 33 Conn., 224, and has been recognized in the state of Pennsylvania. In *Minter's Appeal*, 40 Penn. S. R., 111, Lowrie, C. J., justly remarked: "When we find a man distributing his estate, in whole or in part, among his next of kin, and he leaves the proportions in which they are to take doubtful, it is quite natural for us to suppose that he had the statutory or customary form of distribution in his mind and to interpret his will accordingly." And the opinion of the same judge in *Fissel's Appeal*, 27 Penn. S. R., 55, is equally pertinent.

In the case at bar it is conceded that under the statute governing the descent of estates, the grandchildren of the testator's two deceased sisters and deceased brother would take, by right of representation, their deceased parents' share. The English rule, that referring to children is the same as if they were individually named in the will, in view of the exceptions which so easily set it aside, is of little practical importance, and it does not seem to have been recognized in this state, although cases have been discussed and decided where its application would have been controlling. Our decisions quite uniformly have been in favor of a *per stirpes* distribution in all cases analagous to this.

The case of *Lyon v. Acker*, supra, would seem to be decisive of this. The will contained the clause, "I give to my three daughters, Mary, Susan, and Josephine, and the children of my son Samuel, my homestead, to them and their assigns forever, share and share alike." It was held that the children of Samuel took *per stirpes*, and not *per capita*. The cases are parallel, except as to the degree of kindred and the language employed to denote the portion given to each, and the difference in these respects can make no difference in the principles of construction.

There are several other cases, which, though not as controlling as the above, yet support the views here expressed, and we believe there are no decisions in this state inconsistent with these views. In *Talcott v. Talcott*, 39 Conn., 186, the devise was to the children of one Mrs. Burke, deceased, and though the names of each of the children were given, yet it was held that they took as a class, and not *per capita*. In *Bond's Appeal from Probate*, 31 Conn., 183, the devise was, "I give to my children and their heirs respectively, to be divided in equal shares between them." At the date of the will and at his death the testator had four children living, and four others had previously died, all leaving children. No reason appeared for supposing that the testator had any preference for his surviving children over these grandchildren, and it was held that the estate in question was to be distributed in equal shares among the surviving children and the representatives of the deceased ones. In *Cook v. Catlin*, 25 Conn., 387, a testator having only nephews and nieces made a bequest "to my heirs." The counsel who contended for a *per capita* distribution insisted upon the English rule, that the word heirs was *descriptio personarum*, and that the will must be construed as if the testator had named each heir individually; but this rule was rejected by the court on account of the different construction given to our statute of distributions in the early case of *Kennedy v. Kennedy*, decided in 1786, and the court held that the nephews and nieces should take *per stirpes*, and not *per capita*. In *Lord v. Moore*, 20 Conn., 122, the testator had a wife and four children, to each of

whom by name he first made specific bequests, and then gave the residue of his estate to trustees to "divide the same equally between my said wife and said children and their heirs;" and the court held that these words, in the connection in which they were used, gave to the wife a share equal only to one of the children. In *Gold v. Judson*, 21 Conn., 616, the testator used the following language:—"I give to the heirs of my brother *A*, deceased, the heirs of my sister *B*, the heirs of my brother *C*, the heirs of my sister *E*, and the heirs of my sister *F*, the residue of my estate, to be equally divided between said heirs, each individual alluded to having an equal portion of the same." The intention of the testator was considered too plain on this part of the will for any doubt, and ELLSWORTH, J., in giving the opinion, said:—"We need not remark that the devisees are to take *per capita*, this being the *express language of the will*."

For the foregoing reasons we advise that the estate in question be divided into five equal shares, and that the two surviving sisters take one share each, and that the grandchildren of the deceased sisters and brother take *per stirpes*.

In this opinion the other judges concurred.



46	476
64	70
64	86
45	476
69	283

FRANK E. DRAPER AND ANOTHER *vs.* JOHN H. MORIARTY AND ANOTHER.

A defendant on whom service has been made in an action founded on contract, can by himself plead in abatement the want of service upon a co-defendant.

A plea in abatement is not defective in form because it prays judgment of the declaration as well as the writ.

The rule that pleas in abatement must be framed with the greatest certainty of averment, does not require courts in their construction of them to deny to the language used its ordinary import.

ASSUMPSIT, brought to the Superior Court in Hartford County. The defendant pleaded in abatement, the plaintiff

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traversed the plea, and the court (*Martin, J.*) found the allegations of the plea to be true and rendered judgment upon it for the defendants. Motion in error by the plaintiffs. The case is sufficiently stated in the opinion.

G. G. Sill, for the plaintiffs.

M. R. West, for the defendants.

GRANGER, J. This is an action of assumpsit. The writ was against John H. Moriarty and James Moriarty, both of Hartford, late partners under the name of Moriarty Brothers, and was made returnable on the first Tuesday of May, 1877. No service of the writ was made upon John Moriarty, but a copy was left with James Moriarty, who appeared before the court and filed a plea in abatement, upon the ground that no service of the writ was ever made on John Moriarty. Upon this plea the court found "that two copies of the writ, with the officer's doings thereon endorsed, were left with James Moriarty, one of the defendants, but no copy of the writ or declaration was left by the officer who undertook to serve the same with John H. Moriarty, the other defendant, or at his usual place of abode, nor was the writ read to the said John H. Moriarty, and no service of the writ and declaration of any kind was ever made on said John H. Moriarty, and he did not appear or answer to said action."

Upon these facts the court found the issue in favor of the defendants, and that the writ and declaration should abate and be dismissed. The plaintiffs filed a motion in error, and make three objections to the plea in abatement.

1. To the person pleading; the claim being that James Moriarty, on whom legal service was made, could not *alone* plead in abatement for defective service on his co-defendant.

We fail to see the force of this objection. The law that all the joint contractors must be sued is too well settled to need argument or require the citation of authorities, and if only a part are sued they must plead the matter in abatement. 1 Swift Dig., 184. And service must be made on all the joint contractors named in the writ or it is abatable.

Butts v. Francis, 4 Conn., 426. The writ in this case being abatable, for the reason that no service of any kind was ever made upon John Moriarty, what reason exists why James Moriarty may not plead alone this matter in abatement? In the case last referred to, HOSMER, C. J., says, "where there are two defendants, an attested copy, where the notice is not by personal summons, must be left with each of them, or at the place or places of their usual abode. They may jointly plead a defect of service in abatement, because it is a defense in which they have a joint interest." In that case it was claimed that the plea was bad because both the defendants joined in it. In this case the claim is that the plea is bad because only one of the defendants pleaded in abatement. The court in that case does not hold that one of the defendants may not plead that no service was made on his co-defendant, and none of the cases referred to by the plaintiff sustain this doctrine. The writ in this case being clearly abatable, it was competent and proper for the defendant upon whom service was made to plead that no service was made on his co-defendant and co-promisor.

2. The plaintiff claims that the plea is defective in form, because it begins by praying judgment of the writ and declaration, and not of the writ alone, and the case of *Colburn v. Tolles*, 13 Conn., 524, is referred to in support of this claim. In that case, which was a writ of error, the plea in abatement concluded by praying judgment of the writ alone, and the claim of the plaintiff in error was that it should have prayed judgment of the writ and declaration both. Judge CHURCH, in giving the opinion of the court, uses this language:—"As the only defect complained of is in the service of the writ, there could be no necessity for, and hardly a propriety in, praying judgment of the declaration." It cannot be inferred from this language that the court meant to hold that there would have been an impropriety in praying judgment both of the writ and declaration. If the writ abates the declaration falls with it, and the fact that the plea prays judgment of the declaration as well as the writ is but a circumstantial defect, if it is a defect at all. In the case of

Wilcox v. Chambers, 34 Conn., 179, the court says in reference to pleas in abatement, "We are unable to see why the salutary principle established by statute in relation to circumstantial defects should not be applicable to them." Gen. Statutes, p. 420, sec. 1. A significant note of the revisers under this section is, that "it will help out a plea in abatement." But we do not think this plea needs any such help on account of its praying judgment of the declaration, and the claim of the plaintiff cannot be sustained.

8. The third objection is the failure to prove the allegations alleged. The question whether the facts alleged in the plea were proved or not, was a question proper to be presented to the Superior Court, and that court has found the main facts alleged to be proved. But it is said that the plea is fatally defective because all the allegations are not proved to be true; that such pleas "are not favored, and a strictness is required that is demanded in no other plea." In *Colburn v. Tolles*, already cited, the court says:—"Pleas in abatement must be framed with the greatest certainty of averment. But the rule does not require courts in their construction of them to misunderstand or refuse to comprehend the ordinary import of language." Applying this rule to the plea in this case we find no uncertainty as to the averments. The import of the language of the plea is, that no service of the writ was made on John H. Moriarty, one of the joint promisors and co-defendant. The court below has found distinctly this averment to be true, and that it was sufficient cause for abating the writ.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

ALBERT DAY vs. THE CONNECTICUT GENERAL LIFE INSURANCE COMPANY.

A life insurance company refused to receive the premium on one of its policies from a holder on the ground that it had become forfeited by a breach of one of its conditions by the person whose life was insured. The holder, without rescinding the contract, brought an action against the company on an implied promise to receive the premiums and keep the policy in force. Held that the law did not imply such a promise and that the action could not be maintained.

There were three courses open to the holder of the policy in the circumstances.

1. He might elect to consider the policy at an end, in which case he could by a proper action recover its just value. 2. He might institute an equitable proceeding to have the policy adjudged in force, in which case the question of forfeiture could be determined. 3. He might tender the premium and wait till the policy became payable by its terms, and then try the question of forfeiture in a proper action on the policy.

ASSUMPSIT on a policy of insurance issued by the defendants, a life insurance company, upon the life of James B. Colt, in favor of one A. B. West, by whom it was assigned for a valuable consideration to the plaintiff; brought to the Superior Court in Hartford County, and tried to the jury on the general issue, with notice that the defendants should claim that the policy had become void by reason of a breach of one of its conditions by the assured, before *Beardsley, J.*

The declaration set out the policy, which was dated October 27th, 1866, and was for \$10,000, averred the performance of all conditions required to be performed by the assured and the said West, the assignment of the policy to the plaintiff, and the payment of the annual premium of \$375.10 on the 27th day of October in each year from the issuing of the policy down to and including the year 1871, and a tender of the premium to the defendants on the 27th of October, 1872, and then proceeded as follows:—But the plaintiff says that the defendants, without cause and against the obligation of said policy, wholly refused then or ever to receive or accept the said last named annual premium, and expressly declared that they would not longer continue said policy in force, and that the same had ceased and determined, and had become null and void. And the plaintiff says that the defendants,

their said promises and undertakings not regarding, have never, since said 28th day of October, 1872, accepted or received said last mentioned premium of insurance, or any premium of insurance upon said policy, and have not continued said policy in force, though often requested so to do, but have wholly neglected and refused to accept or receive said premium or any premium of insurance upon said policy, and to continue said policy in force, and have ever since said last named day continued expressly to repudiate said policy, and to refuse to be bound thereby.

Upon the trial the court charged the jury, *pro forma*, and against the request of the defendants, that the plaintiff was in law entitled to recover upon proof of the facts alleged in his declaration, unless the jury should find that there had been a breach of the condition of the policy, and that the damages should be the amount of premiums paid upon the policy with interest. The jury returned a verdict for the plaintiff for \$3,297, and the defendants filed a motion in arrest of judgment for the insufficiency of the declaration, and also a motion for a new trial for errors in the charge and certain rulings of the court, which motions were reserved together for the advice of this court. As the case was here decided solely upon the motion in arrest of judgment, no further notice is taken of the motion for a new trial.

H. C. Robinson and *C. J. Cole*, for the plaintiffs in error.

1. The simple question upon the motion in arrest is—Is a refusal to accept, by a life insurance company, the amount of premium at its maturity, a breach of their contract of insurance, so that an action upon the policy can at once be maintained. The contract of the defendants has been defined often and by the highest authorities. Baron Parke, in *Dalby v. India & London Life Ass. Co.*, 15 C. Bench, 365, says: "The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life." See also *Paterson v. Powell*, 9 Bing., 320; *Com. v. Weatherby*, 105 Mass., 149.

The undertaking then of the company is simply the payment of a certain sum of money on the happening of a certain event. It is not to be performed before the death of the person whose life is insured. The assured is under no contract obligations under the policy. He makes no promises; he has certain privileges which are conditions of his claim upon the company. As our own court expresses it in *Worthington v. Charter Oak Life Ins. Co.*, 41 Conn., 399, "whether the assured will continue it or not is optional with him." And Sir W. M. James expresses the same thing in *In re Albert Life Assu. Co.*, L. R. 9 Eq., 703. See also *Statham v. N. Y. Life Ins. Co.*, 3 Otto, 24. This contract of insurance cannot be broken before its time of performance. It will be conceded that this was the old rule both in England and the United States. But it will be contended that the rule has been relaxed, and that an assertion by the company, made in advance of the stipulated time of performance, that they will not fulfill, is a breach. To this we reply: 1st. Such is not the law anywhere in regard to contracts for the payment of money. 2d. The new English rule, as laid down in certain later cases, has not been recognized, but has been rejected, in this country. 3d. A refusal to accept an annual premium is not a repudiation of the contract of a policy of insurance. That a contract cannot be broken by a contractor in advance of his time for performance, was formerly held to be established law. *Philpotts v. Evans*, 5 Mees. & Wels., 475; *Ripley v. McClure*, 4 Exch., 345. In the case of *Hochster v. De la Tour*, 2 Ell. & Bl., 678, the court carried a principle, which had before been laid down in reference to breaches of promise to marry, and which had been placed upon the ground of the peculiarities of the contract for marriage, one step further, and applied it to a hiring of a servant. In *Danube &c. R. Co. v. Xenos*, 13 Com. Bench, N. S., 825, suit was allowed upon a contract which had been repudiated after the beginning and before the conclusion of the time of performance. The same state of facts existed in *Roper v. Johnson*, L. R., 8 C. P., 167, where coal was to be delivered through the months of May and June, and the suit was commenced May 31st.

In *Brown v. Muller*, L. R., 7 Exch., 319, there had been an absolute breach. In *Wilkinson v. Verity*, L. R., 6 C. P., 206, nothing was decided upon the point, but *Hochster v. De la Tour* was cited approvingly as an analogy. In *Frost v. Knight*, L. R., 7 Exch., 111, which was another breach of promise case, the language of the court, if meant to apply to all contracts, goes to great length in support of *Hochster v. De la Tour*, and the court is driven to the necessity of admitting that a breach in anticipation is a breach of an *inchoate* right. These are the English cases relied upon by the plaintiff. None of them are cases where the contract is for the payment of money. The doctrine of *Hochster v. De la Tour*, has frequently been considered by the New York courts, and never fully approved. In *Crist v. Armour*, 34 Barb., 378, it was somewhat discussed. The case itself came within another rule, to wit, where the contractor had put it out of his power to perform; but the language of the court is very suggestive. The opinion, in dealing with the matter of executory contracts, approves Judge Parsons's views, (on Contracts, vol. 2, p. 678:) "If one bound to perform a future act, before the time for doing it declares his intention not to do it, this is *no breach of contract*, but if his declaration be not withdrawn when the time comes for the act to be done, it constitutes a sufficient excuse for the default of the other party." And the court say: "It would seem to follow from these cases that when either party to a contract which provides for performance by both parties at the same time and place, before the time for performance arrives, notifies the other that he will not perform, and *does not before the time of performance recall such notice*, or if he puts it out of his power to perform on his part, the other party is relieved from avowing or proving performance." The case of *Hochster v. De la Tour* was again cited in *Burtis v. Thompson*, 42 N. York, 246, and the court declined to agree with it. In *Howard v. Daly*, 61 N. York, 377, which was an action for breach of contract for personal services, the commissioner, Dwight, who gives the opinion, decides the case with the concurrence of his four brother commissioners, upon the ground that the suit was not

brought until after the time when the contract was to begin; he then discusses and approves the doctrine of *Hochster v. De la Tour* in reference to matters of personal service, but expressly says, "I presume that it would scarcely be extended to mere promises to pay money or other cases of that nature, where there are no mutual stipulations." His associates however declined to join with him in approving that case. The same doctrine was again invoked before the same commissioners in *Freer v. Denton*, 61 N. York, 492. Commissioner Earl gives the opinion, and takes pains, while deciding the case upon other grounds, to say that the doctrine of *Hochster v. De la Tour* "is not settled as the law of New York." The Supreme Court of Maryland had an excellent opportunity quite recently to approve *Hochster v. De la Tour* and *Frost v. King*, in *Dugan v. Anderson*, 86 Maryl., 567, but after an exhaustive argument in which those cases were urged, they decline to pass upon the question, and say, (p. 582:) "That case (*Hochster v. De la Tour*,) was decided in 1853, and gave rise to a controversy in the English courts, in which their most eminent judges have participated. It may be doubted whether the controversy is yet ended, and the law of England in relation thereto finally settled. No decision upon the subject has yet been made by the House of Lords." The old English doctrine has been frequently recognized in Massachusetts, and these cases, and the whole doctrine of breaking contracts by repudiation before maturity, have received a most masterly investigation by the Supreme Court of that state in *Daniels v. Newton*, 114 Mass., 530, and the principles claimed by the plaintiffs are distinctly and plainly rejected. The opinion of the court in that case is an unanswerable argument for the defendants in the present case. Our own courts have never recognized the doctrine that there may be a breach of a contract before the time of performance by an attempted repudiation. On the contrary the necessity of waiting for a breach until the day of performance is recognized as almost a legal axiom from the first to the last of our reports. *Dean v. Mason*, 4 Conn., 428; *Blakeslee v. Holt*, 42 id., 226. In *Clark v. Terry*, 25 Conn., 896, the principle

seems to be clearly declared. The possibility of breaking a contract of insurance before the death of the assured has never been recognized by the courts of England, Connecticut, Massachusetts or New York. Lord Cairns, in a very recent case, *In re Albert Assu. Co.*, L. R., 9 Eq., 708, says: "It is very difficult to see in a case of a policy of insurance, *how there can be a breach of contract short of a refusal to pay upon the falling in of a life*. I know it has been suggested that a refusal to receive the premiums from year to year would be a breach of the contract, and that thereupon an action might be brought. I do not desire to express any opinion upon that point, but *it is somewhat difficult to see how such an action could be maintained, and certainly so far as I know no such action has ever been brought or maintained.*" In *McAllister v. N. Eng. Mut. Life Ins. Co.*, 101 Mass., 558, the holder of the policy refused to pay his premium note after it had become due, and accompanied his refusal by the statement that "he would not have anything more to do with the company," and abandoned the whole thing, but his administratrix recovered the amount of the policy. In *Howland v. Continental Ins. Co.*, 121 Mass., 499, an action like this one was dismissed as premature, on the ground that a policy contract could not be broken before the death of the assured. In *Hayner v. Am. Popular Life Ins. Co.*, 36 N. York Superior Ct. R., 211, the court, at the first trial, said that a policy holder had no remedy against a company for an attempted cancellation of a policy; but upon a re-hearing, after the decision of the Cohen case, it was held that he had a right in equity to a restoration of the policy. This case has since passed through the Court of Appeals. In *Cohen v. N. York Mut. Life Ins. Co.*, 50 N. York, 610, the Court of Appeals, reversing a judgment below, held that in the case of a policy holder whose premiums had been refused upon insufficient grounds, a court of equity might "*in advance of any present duty, obligation or default, declare the rights and obligations of suitors,*" "*where peculiar circumstances render it necessary to the preservation of rights.*" The decision is distinctly against any theory of a breach of the contract by a refusal to accept the premiums.

A similar result was reached by Judge Blatchford in *Hamilton v. Mutual Life Ins. Co.*, 9 Blatch., 234, where he held that if the company improperly refused the premiums, the assured could have his policy declared to be subsisting and not forfeited in a court of equity. *McKee v. Phoenix Ins. Co.*, 28 Misso., 383, is quoted by May on Insurance as giving countenance to the theory of the plaintiffs, but an examination of the case shows that no such point was made or decided. In *Union Central Life Ins. Co. v. Poettker*, now pending in the Supreme Court of Ohio, it was held by the lower court that the *wrongful* refusal to receive premiums by a company which acted wantonly was a breach of the contract. But the decision rests upon their definition of the contract of insurance, which the court says is an agreement on the part of the insurer to *insure the life from year to year*. The definition is not correct. The Supreme Court of the United States in *Statham v. N. York Life Ins. Co.*, 3 Otto, 24, rejects this definition in terms. The court say: "We agree with the court below that the contract is not an *assurance for a single year*, with a privilege of renewal from year to year, by paying the annual premium, *but that it is an entire contract of assurance for life*, subject to discontinuance and forfeiture. The Court of Appeals of New York in several of the cases before cited, give the same definition as the United States Supreme Court. But if the doctrine of *Hochster v. De la Tour* is good law, we submit that a refusal to accept premiums made in good faith and accompanied with a declaration that the insurer will treat the policy as forfeited, is not such a repudiation of a contract as amounts to its breach. The same court in England which decided *Hochster v. De la Tour*, shortly after held that the refusal to make a breach must be absolute and unequivocal, and must be acted upon by the plaintiffs. *Avery v. Bowden*, 5 Ell. & Bl., 714; *S. C.*, 6 id., 953. This was an action arising out of a charter party, one of whose covenants was that the ship should lie at Odessa forty running days, within which time the shipper was to furnish her cargo. The vessel staid at Odessa from March 11th to April 17th. At four different times during this period the officers applied

for cargo, and the shipper replied, "We have none for you," and at last said, "I have no cargo for you, you had better go away." The judges were unanimous in the opinion that this conduct of the agent did not relieve the plaintiff from the obligation to remain the forty days, and that on that account he could not recover. Mr. Benjamin in his work on Sales, 487, discussing this question in its relation to his specialty, says: "A mere assertion that a party will be unable or will refuse to perform his contract is not sufficient; it must be a *distinct, unequivocal and absolute refusal to perform the promise*, and must be treated and acted upon as such by the party to whom the promise is made. It is very clearly established that if an insurance company accepts premiums with knowledge of a forfeiture, it thereby waives the forfeiture. *Bouton v. Am. Mut. Life Ins. Co.*, 25 Conn., 542. The refusal of the company was only an act of justice to themselves and of common fairness to the holder of the policy. Nor did the plaintiff accept or treat it as a renunciation. He made no offer to release the policy and to claim his damages, but continued to hold the policy, ready to claim the benefit of it if the person insured should die.

C. E. Perkins and *J. C. Day*, for the defendant in error.

The action was not prematurely brought. The authorities, and those of the text writers who touch upon this subject, all agree that when a life insurance company repudiates a policy in the lifetime of the party whose life is insured, an action lies *at once*, as for a breach of contract. *McKee v. Phoenix Life Ins. Co.*, 28 Misso., 383; *Hancock v. New York Life Ins. Co.*, U. S. Circuit Court, 4 Big. Ins. Cases, 488; *Helme v. Phila. Life Ins. Co.*, 61 Penn. S. R., 107; *Smith v. Charter Oak Life Ins. Co.*, 5 Big. Ins. Cases, 212; *Union Central Life Ins. Co. v. Poettker*, *id.*, 449; *Bliss on Life Ins.*, § 417; *May on Ins.*, § 425. It is believed that no case can be found in the books where an action of this kind arising on a policy of life insurance repudiated by the insurance company, has been held not to be sustainable because brought before the decease of the person whose life is insured. In England, in

cases other than those arising on policies of life insurance, the doctrine that an action for damages as for the breach of the contract will lie immediately whenever a contract is distinctly repudiated prior to the time of performance, is now fully established. *Frost v. Knight*, L. Reps., 7 Exch., 111, (reversing *Frost v. Knight*, L. R., 5 Exch., 322;) *Danube & Black Sea R. R. Co. v. Xenos*, 13 Com. Bench, N. S., 825; *Metcalfe v. Britannia Iron Works Co.*, L. Reps., 1 Q. B. Div., 684; *Hochster v. De la Tour*, 2 Ell. & Bl., 678; *Short v. Stone*, 8 Q. Bench, 358; *Ford v. Tiley*, 6 Barn. & Cress., 325; *Bowdell v. Parsons*, 10 East, 359. This is recognized as established law in England in 2 Chitty on Contracts, 11 Am. ed., 1067. This doctrine has also been acted upon in this country. *Holloway v. Griffith*, 32 Iowa, 409, 412; *Crabtree v. Messersmith*, 19 Iowa, 180; *Burtis v. Thompson*, 42 N. York, 246; *Heard v. Bowers*, 23 Pick., 455. See also the opinion of Commissioner Dwight in a case before the New York Commission of Appeals. *Howard v. Daly*, 61 N. York, 362. Also *Freer v. Denton*, 61 N. York, 492, and a discussion of the question, without decision, in *Dugan v. Anderson*, 36 Maryl., 567. Also *Ex parte Pollard*, 2 Lowell, 414. A case closely analogous is *Masterton v. Mayor &c. of Brooklyn*, 7 Hill, 61. The English doctrine as now established is much broader than the exigencies of this case require. A recent case in Massachusetts questions the doctrine as one of universal application, but seems to recognize its correctness in its application to a case of the present character. The distinction is made prominent in the case. *Daniels v. Newton*, 114 Mass., 530. See also *Mullaly v. Austin*, 97 id., 30. A similar limitation of the doctrine is suggested as proper in 2 Parsons on Contracts, 666, and note. The author says: "It might seem more reasonable to permit such an action only when the capacity of the promisor could not be restored before the day, or the promisee had sustained a present injury." Mr. Commissioner Dwight, in *Howard v. Daly*, before cited, makes a similar suggestion. The present case falls fully within the doctrine as thus limited. The contract of life insurance is a peculiar one, and unlike any other, and

the doctrine in question is more applicable to it than to almost any other species of contract. There is an implied contract to receive the annual premiums, and thus not only keep the policy in force, but also formally recognize its validity, and this recognition is of great importance to the assured. "The right to keep the policy alive by payment is a privilege secured to the insured by his agreement with the insurer." *St. Louis Mut. Life Ins. Co. v. Grigsby*, 10 Bush, 310, 314; *Thompson v. Cundiff*, 11 id., 568. The assured purchases a right to have the policy kept in force. *Worthington v. Charter Oak Life Ins. Co.*, 41 Conn., 399. "The obligation to pay and the obligation to receive are mutual." *Cohen v. N. Y. Mut. Life Ins. Co.*, 50 N. York, 610, 625. By the refusal to receive the premiums, and the repudiation of the contract, the assured "sustains a present injury" in various ways; for instance, the policy becomes practically worthless for the purpose of raising money upon it, which is a common and legitimate use of a policy. See *N. York Life Ins. Co. v. Statham*, 3 Otto, 24. Great practical injustice would be done if in a case of this kind no action could be sustained until the decease of the party whose life is insured. *Union Central Life Ins. Co. v. Poettker*, 5 Big. Ins. Cases, 449.

CARPENTER, J. This action is brought upon a policy of insurance upon the life of James B. Colt. The policy is recited in the declaration. It is then averred that the defendants assumed and faithfully promised to perform all the stipulations and agreements in that instrument on their part to be performed, and to keep the policy in force for the term of the whole continuance of the life of the said Colt upon the terms and conditions therein set forth. It then alleges payment of the annual premiums until October 28th, 1872, on which day another payment fell due for the year then next ensuing, and a tender of the amount due that day, and a refusal of the defendants to receive it. It also alleges an express declaration by the defendants that they would not longer continue the policy in force, and that the same had ceased and determined and had become null and void. A

verdict was rendered for the plaintiff, and the defendants filed a motion in arrest of judgment for the insufficiency of the declaration. The questions arising on the motion were reserved for the consideration of this court.

It is not claimed that the alleged promise to keep the policy in force is found in terms in the policy. The only express promise found therein is to pay the policy upon the death of the insured—a contract to pay in the future a certain sum of money. But it is claimed that there is an implied promise to receive the premiums and keep the policy in force, and a breach of this implied promise constitutes the plaintiff's whole cause of action. "Implied contracts," says Blackstone, "are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform." "Implied contracts are those which are raised by operation of law." 1 Swift's Digest, 175. The law raises no contract by implication unnecessarily. Therefore when substantial justice may be done without it, if the party in whose behalf it is claimed does not need it to protect him in the enjoyment of some legal right, and the party against whom it is claimed does not otherwise obtain some unfair and illegal advantage, no contract will be implied. Let us test this case by an application of these principles.

The plaintiff purchased this policy with knowledge of the nature of the contract, the conditions therein contained, and the obligations thereby imposed. He assumed the liabilities and the risks growing out of the conditions without any expectation of receiving any thing in return until the policy by its terms should become payable. When it does become payable the defendants must pay it unless they have a legal defense. If the policy had become null and void, as the defendants claimed, that would be a legal defense. But the jury found against the defendants on that claim, and the question recurs as to the legal effect of refusing to receive the premiums and improperly declaring the policy void. These were the defendants' acts alone, not only without the concurrence of the plaintiff, but against his wishes. It certainly requires no argument to show that neither of these acts, nor

both combined, would be any defence to the action. The plaintiff then would possess all his legal rights unimpaired, notwithstanding the action of the defendants.

But it may be said that the refusal of the defendants to accept the premium and recognize the continued existence of the policy raises a doubt as to its validity, and throws a cloud, so to speak, over the plaintiff's property. This may be so; but the claim that a contract has become null and void by reason of the violation of some condition therein contained is not an invasion of the legal rights of the other contracting party. If the claim is not well founded the party claiming it will take nothing by it, and the legal rights of the other party will remain unimpaired. This must be true of most contracts; hence there will be no occasion to invoke the aid of the law to imply a contract in addition to that expressed by the parties. If however by reason of the peculiar nature of this contract, and the length of time which may elapse before a suit can be brought on the express promise, there is danger that the party may be prejudiced, perhaps a court of equity upon a proper petition might have power to determine the question of forfeiture in advance, and if found not to exist to declare the policy to be in full force. But however this may be, we think it is quite clear that justice may be done and the rights of the plaintiff fully protected without resorting to an implied contract. Nor can it be successfully claimed that the defendants by their action obtained any undue or illegal advantage. If they were mistaken in their claim that the policy was forfeited, and if it be true that the policy notwithstanding such claim remains in full force, and that the defendants in due time will be liable thereon, the result of the defendants' course will simply be the loss of interest more or less on the premiums. The advantages of such a result would be with the plaintiff and not with the defendants.

Again, the law raises an implied contract ordinarily and perhaps always for the purpose of carrying into effect the presumed intention of the parties. When therefore the consequence will be something entirely different from that contemplated by the parties, or if the court cannot clearly

see that the probable consequences were intended by the parties, no contract will be implied. Let us apply this test. We will suppose that the defendants really and in good faith claimed that the policy was forfeited by a breach of the condition. They could not receive the premium without thereby waiving the forfeiture; and if they could, common fairness would require that they should give notice of their intention to claim the forfeiture and decline to take the premium. Now according to the plaintiff's claim they could not do this, if unsuccessful, without forfeiting all their advantages in the contract; yea more, they not only lose all profits, but they have actually carried the risk during all the time the policy was in force. It is in the nature of a penalty for making a legal claim in good faith in a court of justice. It cannot be presumed that the parties intended this. Penalties and forfeitures are odious to the law, and where they are necessarily involved in the consequences of an implied contract, no contract will be implied. But if there is no forfeiture in respect to just profits, the rule of damages being, instead of the premiums paid with interest, the plaintiff's proportion of the reserve, even then the contract would seem to be terminated with a loss to the company of all future profits. The law will not presume that that was the intention of the parties. If the contract was not terminated then a more serious objection to an implied contract arises—a possible liability on both an implied and an express promise; in other words a liability to refund the premiums or pay the value of the reserve on an implied promise, and ultimately to pay the sum named in the policy on the express promise.

We think therefore upon principle that the law raises no such contract as the plaintiff contends for.

We are also of the opinion that the authorities cited in support of the plaintiff's claim are not exactly in point, and do not support the conclusion arrived at. The leading cases are *Hochster v. De la Tour*, 20 E. L. & E., 157, and *Frost v. Knight*, Law Reports, 7 Exch., 111. The first was an action on a contract to employ the plaintiff as a courier, to commence at a certain day. Before the time arrived the defendant

repudiated the contract and declared he would not perform it. It was held that the plaintiff might treat that as a breach and sue as for a breach of the contract before the time appointed for it to commence. The ground of the decision will appear from the following, which we copy from the opinion of Lord Campbell, C. J. "But it cannot be laid down as a universal rule that where by agreement an act is to be done on a future day no action can be brought for a breach of the agreement till the day for the doing the act has arrived. If a man promises to marry a woman on a certain day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. If a man contracts to execute a lease on and from a future day for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. So if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them. One reason alleged in support of such an action is, that the defendant has before the day rendered it impossible for him to perform the contract at the day; but this does not necessarily follow, for prior to the day fixed for doing the act the first wife may have died; a surrender of the lease executed might be obtained; and the defendant might have re-purchased the goods, so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be that, when there is a contract to do an act on a future day, there is a relation constituted between the parties, in the mean time, by the contract, and that they *impliedly promise* that in the mean time neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case of traveller and courier, from the day of the hiring till the day when the employment was to begin they were engaged to each other, and it seems to be a

breach of an *implied contract* if either of them renounces the engagement."

Here the words "impliedly promise" and "implied contract" are used in a very general sense, and not as indicating technically a promise or agreement on which an action can be brought. They seem to be used to indicate, not an independent agreement, but something incident to and forming a part of the express promise and inseparable from it, a breach of which was regarded as evidence of or equivalent to a breach of the express contract. The action it will be observed was not brought on an implied contract "not to renounce the engagement" but on an express promise to hire the plaintiff. So too of the examples put by way of illustration. Lord Campbell does not say that an action will lie on an implied promise not to lease to another, or not to sell and deliver the goods to another, but on the express promise to lease or to sell and deliver goods to the plaintiff.

The case of *Frost v. Knight* was an action on a promise to marry on the death of the defendant's father. While the father was yet living the defendant broke off the engagement. It was held that an action would lie immediately. The court says that by the contract of marriage a "new status, that of betrothment, at once arises between the parties. This relation it is true has not by the law of England the same important consequences which attached to it by the canon law and the law of many other countries. Nevertheless it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other; neither can consistently with such a relation enter into a similar engagement with another person; each has an *implied right* to have this relation continued till the contract is finally accomplished by marriage." Here too it will be observed there is no intimation that a suit may be brought for a breach of an implied agreement, but substantially the same language is used, and in the same sense, and for the same purpose, as that used in *Hochster v. De la Tour*. It will be remembered also that the action was not brought on an implied promise not to marry another person, but on the express promise to marry the

plaintiff. In this case it is different. The action is not brought on the express promise which the defendants entered into to pay money, but on an alleged implied promise to receive the premiums and keep the policy in force.

The cases referred to are leading cases on the subject of maintaining actions on promises before the time arrives for their performance. They have been followed by some of the American courts. In *Burtis v. Thompson*, 42 N. York, 246, they were apparently followed, but in *Freer v. Denton*, 61 N. York, 492, a majority of the court of commissioners hesitated, and it may be regarded as an open question in that state. In *Dugan v. Anderson*, 36 Maryland, 567, the question was discussed but not decided. In Massachusetts they have been rejected, and the soundness of the principle upon which they rest questioned. *Daniels v. Newton*, 114 Mass., 530. We have now no occasion to say whether in a case exactly in point we should or should not follow them, and purposely leave it an open question. We would remark however that the cases seem to establish the proposition that an action may be brought upon a contract in advance of the time fixed for its performance, where the conduct of the other party has been such as to work a practical destruction of the contract or to deprive the plaintiff of all benefit to be derived therefrom. The execution of a lease, and the sale of goods to another party, and the marrying another, seem to be cases of this character, notwithstanding the criticism of Lord Campbell. The parties had placed themselves in a position in which it was impracticable for them to fulfill the contract and which rendered it morally certain that they would not and could not perform it. Not so in the present case. Nothing done by the defendants rendered it impossible for them to perform their contract, or in any way interfered with the payment of money when it should become due. The cases referred to were not contracts for the payment of money. One was a contract for hiring, the other was an agreement to marry. When in the one case there was a declaration by one party that he would not hire, and that was accepted by the other as an end of the contract, and in the other case one party mar-

ried another person, there was in each case an effectual and substantial breach of the contract. The thing agreed to be done could not or would not be done, and nothing was left but for the party in fault to compensate the other in damages. The damages can be ascertained perhaps as well in an action brought before the time for performance as afterwards. Hence an action on the express contract for a breach has been maintained. In this case the contract is to pay money at a future day. Until that day arrives there can be no breach. The party promising may cease to exist or become bankrupt before the day, so that it will be morally certain that the contract will not be performed; but that is no breach, and will not justify the bringing of an action on the contract.

No act of the promissor in a case like this without the consent of the promisee will rescind or terminate the contract, and no act of his before the time will amount to a breach. The declaration that he will not pay or cannot pay does not relieve him of his obligation. That still remains in force, and when the time arrives, if of sufficient pecuniary ability, he may be compelled to perform specifically, that is, to pay the money. The reason that he gives that he will not pay—that the promisee has done some act or omitted to do something whereby the contract is forfeited—does not strengthen the claim. The reason may or may not be true. If it is true that of itself ends the contract and no action can be maintained at any time. If it is not true the claim amounts to nothing. It is no invasion of the legal rights of the other party, as the contract still remains in force. The claim of the plaintiff therefore is really this:—if an insurance company makes a claim that the policy is forfeited by a breach of some condition contained in it, and the claim is not maintained, the policy is thereby converted into a contract to pay money at an earlier day, or that some obligation to pay money arises by implication of law *dehors* the express contract, and in some measure independent of it, which may be enforced immediately. Neither position is tenable, and neither can be maintained upon principle or by authority.

This case is also to be distinguished from a class of cases where both parties concur in treating a contract as rescinded, or, what is the same thing, where one party repudiates the contract and declares that he will not perform it, and the other thereupon elects to treat the contract as at an end and brings an action as for a breach. In such cases actions may be maintained either on the express contract or on an implied contract. Where one party has paid money or performed services for which he has not received a fair equivalent, the law will, if need be, imply a contract to refund or pay what is equitably due in order to prevent injustice. And this principle has been applied to insurance cases.

In *McKee v. The Phoenix Life Insurance Co.*, 28 Missouri, 383, it was held that "if the defendant company wrongfully determined the contract by refusing to receive a premium when due, then the plaintiff had a right to treat the policy as at an end, and to recover all the money she had paid under it."

In *Howland v. The Continental Life Insurance Co.*, 121 Mass., 499, the premium fell due on Sunday, and payment was tendered on Monday and refused. A suit was brought eleven months afterwards, with no previous notice to the company that the plaintiff elected to abandon the policy. The court held that the suit could not be maintained, on the ground that the election was not within a reasonable time.

In *McAllister v. The New England Mutual Life Insurance Co.*, 101 Mass., 558, the insured refused to pay a premium note, and declared that "he would not have any thing more to do with the insurers and abandoned the whole thing;" but he retained the policy and the insurers retained the note, nor did it appear that they consented to the abandonment. It was held that the policy remained in force.

These authorities show, and that alone is the purpose for which we cite them, that in order to terminate the policy in such cases the concurrence of both parties is necessary.

In *Haynes v. The American Popular Life Insurance Co.*, 69 N. York, 435, the company refused to receive the premiums, claiming that the policy had lapsed. The plaintiff brought an action against the company to have the policy

adjudged in force, and obtained judgment. The judgment was affirmed by the Court of Appeals. In *Cohen v. The New York Mutual Life Insurance Co.*, 50 N. York, 610, it was held that the court might exercise equity powers and declare the legal status of the parties.

Thus it would seem that a person situated as the plaintiff was may choose between two remedies—1st. He may elect to consider the policy at an end; in which case, with a declaration containing proper averments, he may recover the equitable and just value of the policy. He ought not to recover more, as the policy was terminated by mutual consent, and it does not seem to be a case where either party ought to be subjected to penal consequences. Of course such a case should depend upon the question whether the policy was rightfully declared forfeited. If it was, the plaintiff can not recover; if it was not, he will recover the full value of the policy. 2d. If he desires that the policy shall continue, he may institute a proceeding to have it adjudged to be in force, in which case the question of forfeiture may be determined. In that case the rights of the parties will be determined in a reasonable time, the parties will be relieved of suspense, and if it is decided against the forfeiture both parties will have what they originally contracted for.

Perhaps a third course is open to him, and that is, to tender the premium, and, if refused, wait until the policy by its terms becomes payable, and then test the forfeiture in a proper action on the policy. This course may involve delay for a long series of years, during which both parties will be in uncertainty as to their legal rights; and it will be attended with this further disadvantage, that both parties may find it difficult to obtain proper proof.

The plaintiff in this case pursued an entirely different course. He did not wait for the policy to become a claim, he did not resort to a court of equity to have the policy established, and he did not elect to consider the policy at an end. But he brought a suit on an alleged implied promise, and seeks to recover the full amount of the premiums paid with interest, leaving the question of the defendants' liability on

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the express promise contained in the policy an open one. This we think cannot be done.

The plaintiff's declaration is insufficient, and the Superior Court is advised to arrest the judgment.

In this opinion the other judges concurred.

WILLIAM ALSOP AND ANOTHER *vs.* WILLIAM S. WHITE.

Personal property was attached by the plaintiffs and a receipt under seal given for it to the officer by the defendant and another, acknowledging the attachment, and a certain value of the property, and promising to re-deliver it on demand or pay the judgment obtained. A year after, and while the suit was pending, the defendant went into bankruptcy and made a composition with his creditors under the bankrupt law. The claim in suit was put by him into his schedule and notice given the attaching creditors, who refused to join in the composition or to accept the composition notes when tendered. The court below rendered judgment in the suit for the full amount of the debt, with an order that the execution be collected only out of the property attached. Held, on a motion in error—

1. That the defendant could not be heard to deny that there was a valid attachment of the property.
2. That the composition proceedings had not affected the plaintiffs' right to judgment in the suit for the full amount of the debt.
3. That the form of the judgment, limiting its operation to the property attached, was right.

ASSUMPSIT on a promissory note; brought to the Superior Court in Hartford County, and tried to the court, on a special plea in bar, before *Culver, J.* Facts found and judgment rendered for the plaintiffs, and motion in error by the defendant. The case is fully stated in the opinion.

L. E. Stanton, with whom was *G. G. Sill*, for the plaintiff in error.

G. E. Gross, for the defendants in error.

WARDEN, J. In May, 1876, Alsop & Clark instituted this

action of *assumpsit* in the Superior Court for Hartford County against William S. White, and by way of security attached a quantity of lumber belonging to him. Of this the officer permitted him to resume possession upon the delivery of the following receipt:

"Received of Homer T. Bissell, deputy sheriff of the county of Hartford, fifty thousand feet of clear lumber, and fifty thousand feet of second clear lumber, all which is this day attached as the property of William S. White, at the suit of Alsop & Clark against said William S. White; as per writ demanding four thousand dollars damages and costs of suit, and returnable to the July term of the Superior Court for Hartford County, on the first Tuesday of July, 1876. Which said property we hereby jointly and severally acknowledge and covenant to be the proper estate of said defendant, and to have been in the possession of the said Homer T. Bissell, under attachment in the above-mentioned suit, and to be of the value of four thousand dollars. And we further jointly and severally covenant to keep the same, at our own risk and expense, and to re-deliver the same to the said Homer T. Bissell, or to his order, on demand; and, on failure thereof, to pay the said Bissell for said property at the above valuation, and such other costs and damages as he may sustain thereby. And we jointly and severally covenant that in case the said William S. White shall become insolvent or bankrupt by the act of himself or his creditors, we will pay the amount of the judgment obtained in said suit, not exceeding the above-mentioned value of the property herein named, to the said Bissell or his order. Dated at Hartford, this 10th day of May, 1876.

WILLIAM S. WHITE, [L. s.]
 GEORGE G. SILL. [L. s.]"

The court rendered a special judgment *in rem* in favor of the plaintiffs, and ordered execution to issue, to be levied upon or collected out of the property attached, and not otherwise.

The defendant files a motion in error, specifying that there was error in deciding that the plaintiffs' claim had not been satisfied and discharged by composition proceedings in the

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United States District Court; in deciding that there was a valid attachment of the lumber; and in rendering the judgment *in rem*.

The lien created by placing an attachment upon property more than four months prior to the institution of proceedings in bankruptcy against the owner remains unaffected thereby; the fourteenth section of the bankrupt act providing substantially as follows:—"As soon as an assignee is appointed and qualified, the judge, or where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, * * * and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by the operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings." And section 5103 of the Revised Statutes of the United States, being the composition clause of the bankrupt act passed in 1874, provides as follows: "In all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor, of the time, place and purpose of such meeting, such notice to be personal or otherwise as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. * * * Such resolution, together with the statement of the debtor as to his assets and

debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. * * The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditor."

On May 7th, 1877, nearly one year subsequent to the date of the plaintiffs' attachment, the defendant made in the United States District Court a proposition for composition, which was accepted by a majority in number and three-fourths in value of his creditors, and was subsequently confirmed by the signatures of himself and two-thirds in number and one-half in value of his creditors, and by the court. The plaintiffs' names and debt were upon the schedule, and the defendant offered them endorsed notes according to the terms of the composition, which they refused to take. They did not appear, or present any claim at the meeting.

The section last recited is to be considered as a part of the law establishing a system of bankruptcy, providing as it does for a compromise between debtor and creditor, to be carried on under the regulation of law and the supervision of the court, for the satisfaction of debts for sums less than their respective amounts, for the relief of debtors from personal liability for the unpaid balance, and for the exercise by creditors of the right to insist that the percentage paid shall be as large as the property can reasonably be expected to yield. Its effect upon liens is restricted within the same limit as is that of the original act.

Also *p. v. White.*

The defendant, desiring to protect himself from the effect of the attachment and detention of the property, regained possession by giving a receipt in which he covenanted to keep and re-deliver it. Doubtless, a subsequent purchaser from him for value could defend against a demand for it by the officer; but, as between the defendant and the officer, the former is not to be heard to say that he has broken his covenant and destroyed the lien; so far forth as he is concerned, the legal effect of his contract is, that for the purposes of the judgment the lien remains in full force. This being true, the law will provide a method by which the plaintiffs can make it available. Under ordinary circumstances a general judgment would have been rendered in their favor. But the compromise proceedings forbid this; for, by these, the defendant has shielded himself from personal liability upon his debts; the plaintiffs are limited to their security upon the property attached; the right to avail themselves of this remains to them; the result can only be attained by the special judgment *in rem*. It assumes this restricted form from the necessities of the case, as the only instrumentality by which they can possibly gather the fruits of their security. To deny them this is to destroy judicially a lien saved by the legislature. *Parks v. Sheldon*, 36 Conn., 466; *Daggett v. Cook*, 37 id., 343; *Batchelder v. Putnam*, 54 N. Hamp., 84; *Iver v. Sturges*, 12 Met., 462; *In re Albrecht*, 17 Nat. Bank Register, 287, U. S. Dist. Court, East Dist. of Michigan.

The officer, while he was in possession of the lumber, granted the defendant's request for permission to sell and deliver some portion of it; the latter now insists that this act vacated the attachment as to the whole. It is a sufficient answer to this to say, that having covenanted that the whole was under a valid attachment, he cannot now deny it.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

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Lazarus v. Ely.

FRANK LAZARUS vs. WILLIAM B. ELY.

The defendant attached the plaintiff's personal property, and a few days after abandoned that attachment, and attached it again on another writ. In the latter suit he afterwards obtained judgment, and the property was sold upon execution and the proceeds applied in part payment of the judgment. In an action of trespass and trover for the taking and conversion of the property, it was held that the damages which the plaintiff was entitled to recover were only for the original taking of the goods and their detention until the second attachment.

TRESPASS for taking and carrying away certain personal property, with a count in trover; brought to the City Court of the city of Hartford, and tried to the court before *Sumner, J.* Facts found and judgment rendered for the plaintiff. Motion in error by the defendant on the ground that the court erred in the rule of damages. The case is fully stated in the opinion.

C. E. Perkins, for the plaintiff in error.

S. C. Dunham, for the defendant in error.

PARDEE, J. LAZARUS, having for his own accommodation obtained Ely's endorsement upon his note, allowed it to go to protest; before paying it Ely prayed out a writ in due form of law against him, and thereon attached certain articles of personal property. Three days later, Ely, having paid the note, abandoned his writ and suit, re-attached the same property upon another writ, caused it to be duly returned to court, obtained judgment thereon, sold the property on execution for the sum of \$180.50, and applied \$118.77 towards the satisfaction of his judgment, the remaining \$11.73 having been consumed in the expenses attendant upon the sale.

Lazarus brought this action of trespass and trover against Ely for the original taking, to the City Court of Hartford. That court laid down the following rule for the assessment of damages, namely, to the value of the property when first taken add the loss sustained by Lazarus by the unlawful detention until the second attachment; from the amount

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deduct \$118.77 by which his debt to Ely was reduced, and assess the remainder as damages. The court found the value of the property when taken to have been \$175; from this was deducted the \$118.77; and judgment was rendered against Ely for the difference, namely, \$56.23. Ely filed a motion in error.

In *Baldwin v. Porter*, 12 Conn., 473, this court said as follows: "That the value of the property converted is the general rule of damages in an action of trover is admitted. To this rule there are exceptions. And both the rule and the exceptions proceed upon the principle that the plaintiff ought to recover as much damages as he has actually sustained and no more; which commonly is the value of the property, and hence the general rule. No good reason, consistently with moral principle, can be suggested why greater damages should ever be recovered than have in truth been sustained, except in those cases where the law permits, by way of punitive justice, the recovery of vindictive damages. Such damages are never recoverable in the action of trover. On this principle, if after conversion the property be restored before suit, damages for the detention only can be recovered." In *Curtis v. Ward*, 20 Conn., 204, Ward attached certain articles of personal property upon process legally issued against Curtis, and held possession thereof for about two months, when the attachment was abandoned, the endorsement of service erased from the writ, a new attachment and service made, and the writ with the endorsement of the last service was returned to court. Ward obtained a judgment, sold the property upon execution, and applied the proceeds in satisfaction of his judgment. Curtis, having brought an action of trover for the original taking, the court thus stated the rule of damages:—"The plaintiff insists that he is entitled to recover the value of the goods at the time of the conversion with interest. This claim of the plaintiff would be well founded, had he never, subsequent to the conversion, received any benefit from the property. Such undoubtedly is the general rule in relation to damages in an action of trover. * * But to this general rule there are certain exceptions, as well established,

says Morton, J., as the rule itself. *Pierce v. Benjamin*, 14 Pick., 356. Thus, if the property for which the action is brought has been returned to and received by the plaintiff, it shall go in mitigation of damages. So, if goods are tortiously taken, and a creditor of the owner afterwards attaches them, and disposes of them according to law, and applies the proceeds in satisfaction of a judgment against the owner, such proceeding may be shown, not as a justification of the taking, but in mitigation of damages. For it would be palpably unjust for the owner to receive the full value of his goods in their application to the payment of his debt, and then afterwards recover that value from another, who has derived no substantial benefit from his property. This rule is not only in conformity with justice but has the sanction of authority. *Pierce v. Benjamin*, supra. The case under consideration is not, in principle, distinguishable from those stated. The evidence offered goes to show that the plaintiff has been once paid for his goods, by a legal appropriation of them to the payment of a judgment against him; and no principle of justice requires that he should be again paid for the same property. The defendants ought to be responsible to the extent of the wrong they have committed and no further." This rule was re-affirmed in *Cook v. Loomis*, 26 Conn., 483.

It must therefore be considered as the law of this jurisdiction that Lazarus could recover damages only for the original taking of his goods and the detention of them until they were regularly attached.

There is error in the judgment complained of.

In this opinion the other judges concurred, except LOOMIS, J., who did not sit.

HENRY C. STEVENS vs. WILLIAM W. GIDDINGS.

The plaintiff offered a city lot for sale at auction, stating in handbills and at the time of the sale that the depth was one hundred feet. The lot was a part of a tract pertaining to a mansion house, and the house, which was situated in part on the lot, was to go with it in the sale, and to be so changed in position as to stand wholly on the lot. The defendant bid off the lot without measuring it, and relying upon these representations. The depth was in fact but ninety five and a half feet, and the difference materially affected its value, especially in the use of it as the site for the house. The defendant four days after the sale informed the plaintiff that he could not accept the lot on account of the deficiency in quantity. Held, in an action brought for the price, that the defendant had a right to rescind the contract.

ASSUMPSIT to recover the price of certain real estate purchased by the defendant at an auction sale, brought to the Superior Court in Hartford County. The defendant pleaded the general issue, with notice that he would show that the purchase of the property was made upon false representations of the plaintiff at the sale that the quantity of land was greater than it was in fact. The case was tried to the court before *Martin, J.*

Upon the trial it appeared that prior to the sale the plaintiff had posted handbills conspicuously about the city of New Britain, within which the property, which consisted of a mansion house and extensive grounds about it, was situated, describing it, and stating as follows:

"This charming estate will be offered at public auction on the premises, on Tuesday, July 2, 1872, at 2 P. M., in five lots, severally, as follows:

"Lot No. 1—35×75, with Gothic stable and carriage house, at small cost convertible into tasteful house.

"Lot No. 2—37½×100, and offset 25×35, with green-house and fixtures.

"Lot No. 3—52½×100, and whole of mansion house therewith, which moved a few feet and cellar made makes this lot a *residence complete*; or dividing mansion, can make *two* separate houses, each house 32×32.

"Lot No. 4—50×90, fronting Main street, shade, etc.

"Lot No. 5—50×90, corner Main and Pearl streets, fountain, etc."

The handbill also stated that other terms and particulars would be made known at the time of the sale. Also that ten per cent. was to be paid down at the sale.

Circulars containing the same description of the property and the same statements were also printed and distributed.

The sale took place on the 2d of July, 1872. Immediately before the sale the plaintiff in the presence of the auctioneer and bystanders read aloud a written notice, of which the following is a part:—

"The whole land, as deeded to Mr. Stephens, measures one hundred feet on Main street and same on rear by land of H. Stanley, two hundred and fifteen feet on Pearl street, and same on grounds of H. Stanley, and can thus be cut up as lots, namely, fifty feet front to each of two lots fronting on Main street, and thirty-five feet, respectively, for fronts on Pearl street. The marks by red flags set at points to show about where corners of lots would come."

The defendant bid off lot No. 3 for \$8,550.

The property offered for sale was situated on the corner of South Main and Pearl streets, in the city of New Britain; Pearl street being upon the south, and South Main street upon the west of the premises. A cedar hedge, three or four feet high, ran along about two-thirds of the north line, and the wall of the green-house on the premises extended along the remainder of the north line, and the hedge and wall were plainly visible at the time of the sale.

Red flags were placed near each corner of the respective lots as each lot was sold, though not exactly at the corners, and about where the lines between the lots would run. Lot No. 3 was ninety-five and a half feet deep, but the plaintiff had never measured it, and supposed it to be a hundred feet deep. The deed by which he acquired his title described the whole of the tract as one hundred feet deep on South Main street. The deed was at the time of sale, and had been for many years prior thereto, on record in the office of the town clerk. The defendant had resided in New Britain many

years, had often seen the premises, and was about the premises at the time the writing was read by the plaintiff, but did not hear the same, or know of the contents thereof at the time he made his bid.

The lot bid in by the defendant was put up for sale in connection with the dwelling-house described in the circular as the mansion house, and which was then standing mostly on this lot, and partly on two other lots, as the property was divided by the plaintiff's sale. To use the house upon lot No. 3, it was necessary to turn it about, changing its front from Main street on the west to Pearl street on the south, and the design of all parties was that the lot should be thus used for the location of the house, and the land was more valuable on that account. The house was seventy-seven feet long.

The auctioneer, when he put up the lot and house, represented the lot as one hundred feet in depth, and made no reference to any other guide to its depth; there was nothing to indicate the rear boundary excepting the hedge, flags, and green-house wall.

The defendant relied upon the statements of the auctioneer and of the circular, and he was influenced in his bid by the representations of the auctioneer. The depth of the lot was a material element in its value.

The plaintiff, after the sale, tendered to the defendant a warrantee deed of the lot, describing it as one hundred feet deep, but the defendant refused to accept the deed, giving as a reason that the land was deficient in quantity. The defendant first made known his unwillingness to take the lot four days after the sale, and has at all times since then refused to accept a deed, and has never paid the plaintiff anything. The plaintiff has suffered damages in consequence of the defendant's not carrying out the alleged contract of sale, and was subjected to great inconvenience and expense thereby, but the court did not upon the hearing estimate the amount of damages, as in the view taken of the case such estimate was not necessary.

Upon the trial the plaintiff claimed and asked the court to rule that the fact that the depth of the lot was less than one

hundred feet, should not, as a matter of law upon the facts found, prevent the plaintiff from sustaining his action, but the court ruled otherwise, and held that the deficiency constituted a full defense to the action. The plaintiff also claimed, and asked the court to rule, that the plaintiff was entitled to recover ten per cent. of the price of the lot, whether or not the quantity of land was deficient, provided the plaintiff had established a sufficient memorandum of the sale; but the court did not so rule, but held that the sum of ten per cent. was not recoverable.

The court having rendered judgment for the defendant, the plaintiff moved for a new trial for error in the above rulings of the court.

C. E. Mitchell and *F. L. Hungerford*, in support of the motion.

The deficiency in the quantity of the land constitutes no defence to the action.

1. The defendant had every opportunity for verifying the statements of the circular and the auctioneer, saw clearly the boundaries of the lot he was purchasing, was tendered a deed of the identical thing he purchased for the gross sum of \$8,550, and the plaintiff acted in the utmost good faith. Under these circumstances it is clear that the defendant cannot now complain. *Sherwood v. Salmon*, 5 Day, 438, 446; *Gordon v. Parmelee*, 2 Allen, 212. In the latter case the court say: "The defendants had the means of ascertaining the precise quantity of land included within the boundaries. They omitted to measure it or to cause it to be surveyed. By the use of ordinary vigilance and attention they might have ascertained that the statement concerning the number of acres, on which they placed reliance, was false. They cannot now seek a remedy for placing confidence in affirmations which, at the time they were made, they had the means and the opportunity to verify or disprove." *Noble v. Googins*, 99 Mass., 231; *Mooney v. Miller*, 102 id., 217, 220.

2. But it further appears from the finding that the posters and circulars stated that additional particulars would be made

known at the time of sale; these particulars were made known, and it was then stated that the whole land was one hundred feet deep *as deeded* to the plaintiff. The defendant is bound by these statements, whether he heard them or not. *Thompson v. Kelly*, 101 Mass., 291, 297. Finally, if the deficiency in the quantity of land was a defence to the recovery of damages in this action, it was no defense to the recovery of ten per cent. of the contract price. *Bean v. Atwater*, 4 Conn., 3, 10.

C. E. Perkins and *H. C. Robinson*, contra.

The misrepresentation with regard to the depth of the lot was so material that it justified a rescission of the contract by the purchaser. It is to be noticed that it was not a sale of pasture land by the acre, and that there was not the provision usually inserted at sales of land by auction in English contracts, that errors in the description shall not avoid the sale, but be allowed for in the price. It was a sale of a "Mansion House," with a lot sufficient to give it ample surroundings. After deducting from the hundred feet the seventy-seven feet actually occupied by it, and a reasonable space from the street line, say ten feet, there would be but thirteen feet left. Now when this back yard is cut down to eight and a half feet, it is crippling the purchase at a material point. A case very similar to the one at bar arose in England, and where the ordinary stipulation of their sales, which they call a "compensation clause" was in the contract, and yet the court held that the purchaser did right to rescind the contract. *Dobell v. Hutchinson*, 3 Adol. & El., 355. A very late case in England sustains the proposition which we are now arguing. *Earl of Durham v. Legard*, 34 Beav., 611. See also *Gibson v. D'Este*, 2 Younge & Coll., 542. In the midst of very conflicting authorities in England as to when a misdescription of premises is a ground for compensation only, and when for rescission, where there is a compensation clause in the contract, we submit that the language of Tindal, C. J., in *Flight v. Booth*, 1 Bing. N. C., 377, and approved by all the best modern text writers, as 1 Parsons on

Contracts, 494, and Atkinson on Sales, 278, is the true one: "It is a safe rule to adopt, that when the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed that but for such misdescription the purchaser might never have entered into the contract at all; in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts the purchaser may be considered as not having purchased the thing which was really the subject of sale." There is, of course, no compensation clause in this contract, but even if there were, we submit that the finding of the court as to the materiality of full depth for the purposes for which the lot was bought, would bring the case within the English rule. How much stronger the case when there is no stipulation that an abatement of price should be the only mode of correcting errors in description. Our own court, in a very recent case, *Church v. Steels*, 42 Conn., 69, has affirmed the materiality of an unintentional misdescription of the measurement of a city lot sold for general purposes.

PARK, C. J. The controlling fact in this case is, that there was a material deficiency in the quantity of land sold. The plaintiff's circular represented the lot to be one hundred feet in depth. The auctioneer proclaimed at the sale that the lot was of that depth. The lot was in fact but ninety-five and one half feet deep. That part of the finding important in this respect is as follows: "The defendant had not measured the lot, and had no knowledge of its depth, but relied upon the statements of the auctioneer and of the circular, and he was influenced in his bid by the representations of the auctioneer. The depth of the lot was a material element in its value." The importance of the deficiency of the land sold will appear when it is considered that it was sold with a dwelling-house which was seventy-seven feet in length. The sale of the other tracts of land rendered it necessary to change the location of the house, so that the length of the

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house would be on a line with the depth of the lot. Hence, when the house has been placed in its new position, there will be less than ten feet space left unoccupied at each end of the house.

We think the finding of the court upon this subject is decisive of the case. The defendant was not bound to accept a lot in the circumstances of this case, which was but ninety-five and one-half feet in depth, for one of one hundred feet in depth, when the court has found that the depth of the lot was a material element in its value.

But it is said that the defendant had the opportunity to measure the depth of the lot before purchasing, and that therefore the fault was his own. It would be altogether unusual for a purchaser to measure the depth of a lot after the seller by his circular had represented it to be of a certain depth, and his agent the auctioneer had positively asserted at the time of the sale that it was of that depth. It would be far more reasonable to hold the plaintiff bound by his acts and declarations under the circumstances, than to hold the defendant bound by his omission to make the measurement. We think the defendant had the right to rely on the representations of the plaintiff and on the declarations of the auctioneer.

We do not advise a new trial.

In this opinion the other judges concurred, except LOOMIS, J., who did not sit.

MATILDA LYON vs. SILAS W. ROBBINS AND ANOTHER.

A widow owning a life estate under the will of her husband in certain lands, joined with a part of the reversioners, all of whom were tenants in common, in making a mortgage by metes and bounds of a portion of the lands, the mortgage note being signed by them jointly, and the money obtained on the mortgage being used by the life tenant in repairs on the premises. The other mortgagors afterwards sold their interests in all the lands to R. The mortgagee afterwards brought a bill of foreclosure against R and the life tenant,

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and after the foreclosure became absolute by a failure to redeem *R* purchased the interest of the mortgagee, paying him therefor the amount of the mortgage debt and costs. The life tenant afterwards brought a bill in equity against *R*, alleging that she had no notice of the foreclosure proceedings, and praying to be allowed to redeem on paying to *R* what he had paid the mortgagee, with interest, which right was decreed to her. She afterwards paid the amount to *R*, and then, after demand made, brought a bill in equity to compel *R* to contribute towards the amount paid by her in redeeming or be foreclosed of all right to redeem his interest in the land. Held—

1. That *R* could not set up the fact that the mortgage was void, the court in the first bill of the petitioner against him having found the fact of the mortgage and of the amount due under it, and having therefore necessarily found its validity.
 2. That although the first bill of the petitioner against *R* could have been so framed that the whole question between the parties could have been settled by a single decree, yet the fact that she had brought that bill and obtained a decree under it did not preclude her from bringing the present bill, the objects of the two bills being entirely different, although the general facts alleged were the same.
 3. That it could not be presumed that the petitioner as tenant for life was liable for waste, nor that any waste had been permitted by her, nor that the money was expended for repairs which she was required to make.
- A tenant in common of an equity of redemption, if he redeems, must pay the whole mortgage debt, and can not compel the mortgagee to accept such portion of the mortgage debt as is represented by his interest in the land.
- And having paid the whole mortgage debt he has no right of contribution against his co-tenants personally, but his only remedy is by a foreclosure of their interests in the land if they fail to pay their share; and they have the option to pay or give up their interests.

BILL IN EQUITY for a contribution and foreclosure; brought to the Superior Court in Hartford County. The principal allegations of the petition were as follows:—

That the petitioner since the year 1864 has been and still is seized for the term of her natural life, by virtue of the last will of her late husband, Ezra Lyon, of the following piece of land with the buildings thereon standing, to wit: [describing it;] that by virtue of said will each of the five children of the said Ezra was seized and possessed of one undivided fifth part of all the real estate of the said Ezra, including the piece above described, subject to the life estate of the petitioner; said children being George F., John M., James A., Mary W., and Sarah Lyon; that on the 28th day of February, 1866, the petitioner, together with the said George F., John M., and James A. Lyon, was indebted to Samuel A. Castle in the

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sum of \$400 by their promissory note of that date, signed by them jointly; to secure the payment of which the petitioner, with the said George, John, and James, executed on that day a conveyance of all their respective interests in said described tract of land, by one and the same deed of mortgage; that said sum of four hundred dollars was borrowed and used for the purpose of making repairs upon said premises so mortgaged; that on the 5th day of March, 1866, the said George conveyed all his interest in all the estate so received by him from the said Ezra, including the piece described above, to Silas W. Robbins; and on the 24th day of December, 1866, the said John conveyed all his interest in the estate received by him from the said Ezra, including the piece described above, to Henry C. Dwight; that on the 19th day of February, 1873, the note being then due and unpaid, said Castle brought his bill of foreclosure against the petitioner, the said James A. Lyon, and the said Robbins and Dwight, to the March term, 1873, of this court, alleging the non-payment of said note, and praying that unless this petitioner or said James or said Robbins or said Dwight should pay the same within such time as the court should limit, they and each of them should be forever foreclosed of all equity to redeem said mortgaged premises; and said court did at said March term find that there was then due said Castle on said mortgage the sum of \$571.20, and ordered and decreed that unless the petitioner or the said James A. Lyon should pay said sum and interest, with the sum of \$33.81 taxed as costs on or before the 23d day of June, 1873, they should be forever foreclosed of all equity to redeem said mortgaged premises; and that unless said Dwight should pay said sums on or before the 9th day of July, 1873, he should be foreclosed in like manner; and that unless said Robbins should pay said sums on or before the 16th day of July, 1873, he should be foreclosed in like manner. And the petitioner says that neither the said James A. Lyon, the said Robbins; or the said Dwight, paid said sums within the times limited, although each of them had due notice of the bringing of said petition, and said Robbins and Dwight were present in answer thereto by their counsel; and

this petitioner did not pay said sums within the time limited, nor did she have any notice whatever of said petition until after the title to said premises had become absolute in said Castle. And said Castle recorded his certificate of foreclosure in the records of said Wethersfield on the 30th day of August, 1873, and on the 27th day of said August sold and conveyed to said Robbins the premises so foreclosed; and said Robbins on the 22d day of September, 1873, conveyed one undivided half of said interest so obtained to the said Dwight. And the petitioner says that, having discovered the foreclosure by said Castle, she brought her petition to the December term, 1873, of this court, therein alleging the foregoing facts, and praying that said decree be re-opened as to her alone, and that she be allowed to redeem said premises on paying to said Robbins and Dwight such sum as said Robbins had paid to said Castle as aforesaid and the interest thereon. And said court, at its January term, 1875, to wit, on the 1st day of February, 1875, did find said facts and that the sum paid by said Robbins to said Castle, with interest thereon to said 1st day of February, amounted to \$732.68, and thereupon did decree that this petitioner be allowed to redeem said premises on paying to said Robbins and Dwight said sum of \$732.68 on or before the first Monday of May, 1875, with the interest thereon accruing from said 1st day of February; as will more fully appear from the petition, finding of the committee, and the decree of the court thereon, to be shown in court. And the petitioner says that before said first Monday of May, to wit, on the 19th day of April, 1875, she paid to said Robbins and Dwight said sum of \$732.68, together with the interest thereon, and so has redeemed said mortgaged premises, but that she has no further title or evidence of title thereto than what is afforded by and exists in virtue of said last mentioned decree, to wit, a life estate therein. And during the pendency of said petition last above mentioned, the said James A. Lyon conveyed to the said Robbins and Dwight all his interest in said premises, so that the said Robbins and Dwight have now all the record title to said mortgaged parts of said premises, and are the owners thereof.

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in equal and undivided portions, except so far as their title thereto is affected by said last mentioned decree, and your petitioner has only a life estate that she can claim absolutely. And your petitioner says that in order to redeem said mortgaged premises she has been at great expense, besides paying to said Robbins and Dwight a sum nearly double the principal sum of said note, although she was only one of four promisors thereon, and that said Robbins and Dwight stand in the places of the said George F., John M., and James A. Lyon, the other three promisors, and have the record title to the respective interests in said mortgaged premises as mortgaged by the said George F., John M., and James A. Lyon as co-promisors and co-mortgagors as aforesaid; and said Robbins and Dwight ought in equity to reimburse to your petitioner three-fourths of said sums she has so paid as aforesaid, or relinquish to her the respective interests they hold from said co-mortgagors. She therefore prays the court to inquire into the truth of the foregoing allegations, and on finding the same to be true, to order and decree that unless said Robbins and Dwight, or either of them, shall contribute and pay to your petitioner such equitable proportion of such sums so paid by her as aforesaid, within such reasonable time as this court shall limit and appoint, then they and each of them shall be forever foreclosed of all equity to redeem the interests so mortgaged and conveyed by said George F., John M., and James A. Lyon, and said several interests shall thereupon and forever thereafter be and remain vested absolutely in the petitioner.

The respondents demurred to the petition, assigning the following grounds of demurrer:—

1. That the mortgage deed set up in the petition is null and void, because it appears that at the time of its execution the petitioner and the five children of Ezra Lyon were tenants in common and as such owners in fee of the premises described in the mortgage, and of other separate and distinct pieces of land lying in this state, the petitioner owning a life estate in all the land and the five children owning all the land subject to said life estate. And said deed does not convey, and does

not purport to convey, more than one piece of said land, describing the same by metes and bounds, and is made by only a part of said tenants in common, the said Sarah never having sold or parted with her one-fifth interest in any part of the premises, but being still the owner of the same.

2. That the facts set up in the petition are the same facts set up in the former petition to this court against the present respondents, as appears by this petition and the prior petition of the petitioner, referred to and made part of this petition, and all the facts set up in this petition have been adjudicated, and a decree has been passed by this court in said prior petition covering all the facts and allegations in this petition, which judgment and decree are in full force, and form a complete bar to this petition.

3. That it appears that the petitioner, at the time of the execution and delivery of the mortgage deed and note, had a life estate in the premises described in the mortgage deed, and the buildings thereon, and that she was and is obliged by law to keep the buildings thereon in good and sufficient repair so as to prevent waste; and that it appears by said petition that said money for which said mortgage and note were given was used by the petitioner for the purpose of making repairs on said premises so as to prevent waste, and that said money was therefore had for her own use and benefit.

The court (*Martin, J.*) held the petition insufficient, and dismissed it. The petitioner thereupon brought the record before this court by a motion in error.

S. W. Adams, for the petitioner.

The general rule being well settled, that where one of several co-mortgagors pays the common debt, the other co-mortgagors must contribute their proportion to the party paying, or relinquish to such party their respective mortgage interests, (1 Washb. R. Prop., book 1, ch. 16, § 5, art. 21, and § 8, arts. 9, 10,) what is there to make this case an exception to the general rule? The respondents' demurrer suggests three reasons:

1. They say that the mortgage deed referred to "was and

is null and void," because, they say, "it conveys but *one* piece of said land, being a part of said premises, describing the same by *metes and bounds*." An examination of the record shows that it conveys only the "right, title and *interest*" of each mortgagor in the piece in question. No case can be found which denies the right of any tenant in common to convey his *interest* merely, in any property, real or personal. The cases of *Mitchell v. Hazen*, 4 Conn., 495; *Griswold v. Johnson*, 5 id., 366; *Merrill v. Berkshire*, 11 Pick., 269; *Porter v. Hill*, 9 Mass., 34; *Marshall v. Trumbull*, 28 Conn., 185, and *Hartford & Salisbury Ore Co. v. Miller*, 41 id., 112, are all cases where there was a sale by "metes and bounds," or else (as in the case of *Marshall v. Trumbull*, where the grantor *reserved a right of passway* from the undivided interest conveyed,) there was a conveyance which was construed to be the same in effect. Nothing is more common than for devisees to sell their *interest* in specific pieces before any distribution has been made, and before it is known what that interest may be. But even if the mortgage deed had been defective in that particular, it would have been good as against the *mortgagors*; they, and any holding under them, would have been estopped to deny that it conveyed their *interest*. Opinion of CARPENTER, J., in *Hartford & Salisbury Ore Co. v. Miller*, 41 Conn., 132, 133.

2. The respondents further say that "all the facts set up in this petition are the same as those set up in said prior petition, which have been *adjudicated*, and form a complete bar to this petition." Many of the "facts" stated in this petition were set up in the prior one, and were *found* by the court, and, to that extent, these facts may be said to be adjudicated. But, as the principal fact alleged in this petition (to wit, the redemption of the mortgage by the payment of the common debt,) has occurred since the prior petition was brought and disposed of, and it so appears from the record, it would seem to be an impossibility that the facts set up in this petition are "the same" with those set up in the first one. It is not claimed that the *prayer* of this petition is the same contained in the first one. That had reference only to

the *petitioner's* mortgage; this seeks a final disposition of *all* the mortgages. *Dickinson v. Hayes*, 31 Conn., 423.

3. It does not nor can it appear from the record, as the respondents say, that the petitioner "was and is obliged by law to keep the buildings in good and sufficient repair," whatever may be inferred therefrom as to her duty "to prevent waste." Whilst a tenant for life, by act of the parties, may not *commit* waste, (Gen. Stat., 490,) it does not follow that the law casts upon such a tenant the obligation to "keep the buildings in good and sufficient repair." This might be requiring an impossibility. Previously to the statute of Marlbridge, it was only tenants made such by *operation of law* who were liable for waste at all (1 Washb. R. Prop., book 1, ch. 5, § 4, art. 1); and even now, the rule goes no further than to require such a tenant to use "*ordinary care*" to prevent buildings going to decay, and he is "not bound to expend extraordinary sums for that purpose." *Id.*, book 1, ch. 5, § 4, art. 31. And, for aught that appears from the record, a great deal more may have been expended for the same purpose as this sum of \$400. Besides, presumptively, the other co-mortgagors were living in the same homestead, and hence any repairs would inure to *their* benefit as well as the petitioner's. And as the respondents bought these mortgage interests within a few months after all the improvements were made, they must have received the full benefit of the cost of them.

M. R. West, for the respondents.

1. A deed by one tenant in common by metes and bounds of one portion of the land or of his interest in such portion is void. 1 Swift Dig., 103; *Starr v. Leavitt*, 2 Conn., 243; *Mitchell v. Hazen*, 4 *id.*, 495; *Griswold v. Johnson*, 5 *id.*, 366; *Gates v. Treat*, 17 *id.*, 392; *Marshall v. Trumbull*, 28 *id.*, 185; *Marsh v. Holley*, 42 *id.*, 453; *Porter v. Hill*, 9 Mass., 34; *Merrill v. Berkshire*, 11 Pick., 269; *Adams v. Briggs Iron Co.*, 7 Cush., 361.

2. A former decree in a suit in equity between the same parties, and for the same subject matter, is also a good defence

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in equity. 2 Story Eq. Jur., § 1523; 2 Swift Dig., 235. If the right has been decided, the judgment will be conclusive, though the cause of action in the former suit, and the object to be obtained by it, were different from those in the subsequent suit. 1 Swift Dig., 752; *Betts v. Starr*, 5 Conn., 550. The present petition, and the former petition and decree referred to and made part of it, show that the same subject matter between the same parties has once been passed upon by this court. Demurrer will lie for this. Story Eq. Pl., §§ 790, 791.

8. The money was borrowed by the petitioner and used for the purpose of making repairs upon the mortgaged premises. The court will presume that it was borrowed for the making of necessary repairs, so as to prevent waste. She was bound to keep the buildings and premises in repair. Gen. Stat., p. 490, sec. 9; 1 Swift Dig., 517; *Town of Hamden v. Rice*, 24 Conn., 850.

GRANGER, J. The first objection made by the respondents in this case to the relief sought by the petitioner in her bill is, that the mortgage to Castle was void, because it was a conveyance by metes and bounds, of a part of certain lands held by tenants in common, by a part only of the tenants in common.

Conceding the correctness of the general rule which makes such a conveyance void, yet we think the respondents stand in a position in which they can not be heard to make this objection.

Castle, the mortgagee, brought a bill for a foreclosure against the present respondents and petitioner. In that case the court found the fact of the mortgage and the amount due under it, and made a decree limiting the time for redemption. In this the court necessarily found, and established as between the parties to that proceeding, the validity of the mortgage. After the decree had taken effect the present respondents, Robbins and Dwight, purchased the title acquired by Castle by the mortgage and foreclosure, paying him the amount due under the mortgage and the costs; a mode of redemption

apparently arranged beforehand between these respondents and the mortgagee, the title being allowed to become absolute under the foreclosure for the purpose of cutting off all other claims. The present petitioner then brought a bill to redeem against Robbins and Dwight, averring that she had no notice of the petition for foreclosure, and offering to pay the amount paid by them to Castle with interest. Upon this bill the court found the facts as alleged, and passed a decree allowing the petitioner to redeem on making such payment. In this decree the court again found the existence and necessarily the validity also of the mortgage to Castle. Thus this very point, which the respondents now make, as to the validity of the mortgage, has been adjudicated not only in the foreclosure suit of Castle against the present respondents and petitioner, which would perhaps be conclusive against the respondents in the present suit, but again in the suit brought by the petitioner to redeem, in which case the parties were the same as in the present case. We think it clear therefore that the question can not be regarded as an open one in the present case.

The respondents make the further point that the matters set up in the present bill are to be regarded as having been adjudicated in her former bill.

It is to be observed that this question is not properly before us. The case stands upon a demurrer to the petitioner's bill. The respondents in their demurrer assign several causes of demurrer, in the form usually adopted in cases of special demurrer, while the causes assigned are wholly grounds of general demurrer, if they can be raised at all in that mode. Among these causes of demurrer there is assigned the fact of this former adjudication. But this fact does not appear on the record, and the demurrer can reach nothing that does not so appear. It is stated that the record of the former proceeding is referred to and made a part of the petition. This, however, is not so. The only allusion to that record is in the suggestion that it is ready to be produced in court. What it is, what its averments are, and what the precise relief sought, does not appear from the present petition.

But as this question may be raised in the case hereafter, we think it best to consider and decide it here.

The petition in that case set up the fact of the mortgage, the foreclosure obtained by Castle, the amount found due on the mortgage, the expiration of the time to redeem without redemption, the purchase of the mortgage title by the respondents for the amount of the mortgage debt, the failure of the petitioner to receive notice, and her equitable right to redeem the property out of the hands of the respondents by making to them the payment that under the decree she was required to make to Castle. Her present petition alleges the same general facts, and her payment to the respondents since the decree of the amount found to have been paid by them to Castle, with interest, as also her equitable right to a contribution from the respondents towards the amount which she had paid on redemption, and their refusal to make such contribution. Now it is very obvious that these two bills do not contain substantially the same allegations, nor seek substantially the same relief. The claim of the respondents therefore, that the two bills were for the same matter, so that the subject matter of the last petition is to be regarded as adjudicated in the former suit, has really no foundation.

But the real point, though not presented very clearly by the record, is, whether the proper time and place for the petitioner to seek the relief which she now seeks was not in the former suit. In other words, as she now seeks re-payment of three-fourths of the sum which she paid the respondents under the former decree, thus paying only one-fourth of the sum herself, was she not bound to ask in that suit for a redemption of her interest in the property, on paying this quarter, and not the whole?

We think that the petitioner might have so framed her bill in the former case that the court could have disposed of the whole question between these parties in that suit, and that it would have been better for her to have done so. But there is no rule which required her to present her present case to the court at that time. She did not in fact present it, nor seek the relief which she now seeks. If the relief now sought was such as was necessarily considered and passed upon in the former suit, her neglect to avail herself of that opportu-

nity to present her full case might have precluded a further hearing upon the matter. But not only was this not the case, but there are reasons why the rights of the parties may perhaps be dealt with more advantageously to both in the present than in the former suit. If in that suit she had offered to pay only her quarter of the mortgage debt and had sought to redeem only her life interest, she would have been leaving the respondents no option but to keep their reversionary interest and pay therefor the other three-quarters of the mortgage debt. But she had no right to thus compel them to pay the three-quarters. Any tenant in common redeeming the common property by paying a general incumbrance, can not redeem merely his share of the land held in common by paying his share of the incumbrance, but he can redeem only by paying the whole encumbrance, and then, standing upon that encumbrance, he can turn around and foreclose his co-tenants unless they will pay him their share. But his remedy is only by this proceeding of foreclosure. He has no claim which he can enforce against them personally. They have their option to pay or give up the land. This option can not be taken away. This point can be made clear by an illustration. A mortgagee of a piece of land we will suppose becomes by purchase a tenant in common with the mortgagor of the equity of redemption, each owning an undivided half. We will suppose the mortgage debt to be \$2,000. If the mortgagor desires to redeem, he can not do so by tendering to the mortgagee \$1,000 as his half of the mortgage debt, redeeming thereby his half of the land. The mortgagee is entitled to the whole amount of his mortgage, and the mortgagor, if he desires to redeem, must pay the whole encumbrance and redeem the whole land. When he has done this he can turn around and foreclose his co-tenant, the original mortgagee, unless he will pay him his half of the mortgage debt. But why is he compelled to do this, when it would seem so much simpler and more direct for him to have redeemed at first only his own half of the equity, leaving the mortgagee, who was also his co-tenant, to keep his half of the land and cancel a corresponding half of the mortgage? The

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answer is, that by this latter course he would have been compelling his co-tenant to redeem his half of the land. This he can not do. The co-tenant has his option whether to redeem or let his interest as tenant in common go. No personal obligation rests upon him to redeem, or to pay any part of the mortgage debt. If the mortgagee were compelled to accept half the debt and keep half the land for the rest, it would be imposing upon him a personal obligation which does not exist. He therefore as mortgagee may demand of the mortgagor, on a redemption by the latter, the payment of the whole mortgage debt. This is his personal right. The duty afterwards of contributing towards the payment on the ground of his being also a co-tenant with the mortgagor, is a burden on the land alone, not a personal duty, and he must be left to exercise his own option as to whether he will pay the money and save his interest in the land, or refuse to pay and let his interest be foreclosed.

Now it may be that the mortgagor in his bill to redeem, in the case we are supposing, might so frame his bill that the court would consider the whole question between himself and his co-tenant, and decree that he should be allowed to redeem his half interest on paying half the mortgage debt, provided that the mortgagee in his character as co-tenant would consent to such partial redemption, but that if he would not so consent the mortgagor should pay the whole mortgage debt to the mortgagee, who should thereupon, in his character as co-tenant, become foreclosed of all right to redeem his interest in the land, which should thereupon become vested in the mortgagor. Such a decree is the only one that could possibly cover the whole case. It is complex and involves a contingency, and while it might be better that a single suit in equity should settle the whole question between the co-tenants in such a case, it is very clear that the mere fact that the mortgagor had brought merely a bill to redeem in the first instance, and had obtained a decree allowing him to redeem on paying the whole debt, would be no bar to a later bill, brought after such redemption, to compel the co-tenant to contribute or be foreclosed. The facts of the two cases would

be to a great extent the same, except the important one of the payment alleged in the last bill of the whole mortgage debt by the mortgagor, but the relief sought in the two bills, and indeed the entire objects of the two bills, would be wholly different. One would be based upon and recognize the personal right of the mortgagee to full payment of the mortgage debt; the other would assert and be based upon the liability of the interest of the co-tenant in the land to be subjected to contribution toward the sum so paid.

We therefore regard the present bill as essentially different from the former one, and in no manner precluded by it.

The third point made by the respondents is, that it appears that the petitioner at the time of the execution and delivery of the mortgage had a life estate in the land and buildings described in the mortgage, and that she was obliged by law to keep the buildings in good and sufficient repair, so as to prevent waste, and that it appears by the petition that the money for which the note and mortgage were given was used by the petitioner for making repairs on the premises so as to prevent waste, and that the money was had for her use and benefit, and that therefore she is not entitled in equity to a contribution from the respondents on account of having paid the money. It is true that it appears that the petitioner had a life estate in the premises, and that the money for which the note and mortgage were given was borrowed and used for the purpose of making repairs upon the mortgaged premises; but it nowhere appears that any waste had been committed or suffered to take place by the petitioner, nor that the repairs were made to prevent waste; nor is it shown that the petitioner was obliged by law to keep the buildings in repair so as to prevent waste. She is not tenant in dower, but has a life estate in all the real estate of her deceased husband under his will. The finding of the committee in the former suit, which is referred to in the petition and printed with the case, is as follows on this point:—"The title to the whole of this land, including that described in the mortgage deed, was derived from her (the petitioner's) late husband Ezra Lyon, and the remainder of all said land, subject only to the life

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estate of said Matilda, upon the death of said Ezra descended to and vested in the said George F. Lyon, John M. Lyon, James A. Lyon, Mary W. Judd, and Sarah Lyon, children and heirs-at-law of the said Ezra, in equal proportions as tenants in common, and has never been distributed." The estate of the petitioner was created by the act of the parties, and not by operation of law, (*Town of Hamden v. Rice*, 24 Conn., 356,) and whether the petitioner might or might not commit waste depends upon the terms of the will. She might have been authorized by the devise to do acts which otherwise would be waste by the statute. Rev. Statutes, p. 490, sec. 9; *Town of Hamden v. Rice*, supra. The will is not before us for construction, and we know nothing of its provisions except what appears from the above finding of the committee, and we cannot say that the petitioner was liable for waste. And it does not appear what was the nature of the repairs made. They might have been, and probably were, of such a character as to increase the value of the property and be of essential benefit to the reversioners; and this we think it is fair to presume was the reason why three of them joined with the petitioner in executing the note and mortgage.

None of the claims made by the respondents under their demurrer can be sustained by any principle of law or equity.

The bill of the petitioner is sufficient, and there is manifest error in the judgment of the Superior Court.

In this opinion the other judges concurred.

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SUPREME COURT OF ERRORS.

FAIRFIELD COUNTY.

JANUARY TERM, 1878.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS, AND GRANGER, JS.

BARNABAS ALLEN AND ANOTHER *vs.* SAMUEL H. RUNDLE
AND OTHERS.

The plaintiffs had a claim for \$7,000, for money lent, against a joint stock corporation. A new corporation was formed, which took its business and assumed its liabilities, but the subscriptions to its stock were not to be binding unless \$250,000 was subscribed within a certain time. The time being about to expire and the subscriptions falling \$30,000 short, *B*, who was already a subscriber, agreed, upon the solicitation of the other subscribers, to take the remaining \$30,000 on their signing a bond of indemnity, which bond was signed by twenty-one of the stockholders and the subscription thereupon made by him. Afterwards the plaintiffs demanded of the new company payment of the \$7,000, and were about to sue, when it was arranged that *B* should give them his own note for \$7,000, with a guarantee on the back of it signed by the defendants, who were seven of the twenty-one signers of the bond of indemnity; which arrangement was carried out. Held that general assumpsit for money had and received would not lie in favor of the plaintiffs against the guarantors of *B*'s note.

The ground on which a promissory note is evidence under the general counts is that it is presumed that money has been received by the maker. But the guarantee of the defendants created no such presumption.

And held that it could not be shown by parol that the defendants, though in form guarantors, in fact undertook thereby to obligate themselves to pay the note. Nor that they made at the time a verbal promise to pay the debt.

And that any promise made by the defendants at any time to pay the debt would be without consideration.

And held that the doctrine of novation did not apply, inasmuch as the defendants did not owe the corporation, and were not therefore applying their own debt to the payment of the indebtedness of the corporation.

A novation does not create a new indebtedness, but simply applies an existing indebtedness in payment of a debt of the creditor; and it is a necessary incident of the transaction that the original indebtedness to the intermediate creditor, and his indebtedness to his own creditor, should be discharged.

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In this case the \$7,000 for which *B* gave his note to the plaintiffs, with the guarantee of the defendants, had been credited on *B*'s subscription of \$30,000 to the stock of the new company; but this was done by the financial agent of the company of his own accord and with no authority from *B*. Held not to bring the case within the law of novation.

ASSUMPSIT on a guarantee of a note by the defendants, with the common counts; brought to the Superior Court in Fairfield County, and tried to the court on the general issue.

On the trial the plaintiffs withdrew the special count in their declaration, and under the common counts claimed to recover the sum of \$7,000, and interest thereon from the 25th day of May, 1872, with the taxes thereon that had since accrued, and offered in evidence in support of their claim the following promissory note:—

“\$7,000. Danbury, November 25th, 1871.

On demand I promise to pay Barnabas Allen and William F. Taylor seven thousand dollars, with interest semi-annually, and the taxes that may accrue on the same, for value received.

Signed, CHARLES BENEDICT.”

On the back of the note there was an endorsement as follows:—

“For value received we jointly and severally guarantee the within note good and collectible until paid. (Signed). S. H. Rundle, William P. Seeley, Andrew Hull, Isaac W. Ives, Charles Hull, Charles C. White and W. F. Lacey.”

The signers of the guarantee are the defendants in the present suit.

The plaintiffs claimed that the facts and circumstances under which the note was given were such that the defendants, who were ostensibly guarantors, were not in fact such merely, but were really makers of the note; and that as such they were liable to the plaintiffs in the present action, under the count for money had and received. The defendants claimed that they were liable as guarantors only, and as such could not be holden on the common counts; that parol evidence was inadmissible to vary their liability as expressed in the contract of guaranty, or to show that they were liable in any way on the note except as guarantors, or to show

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that Benedict signed the note under a promise from them that he should never have it to pay, or that he was not liable thereon as maker. They also denied that any consideration had ever moved from the plaintiffs to them on which to base an action on the common counts; and there was in fact no evidence of such consideration except as hereinafter appears.

The main controversy between the parties was whether the defendants were in this action liable as makers of the note in suit; or in any way primarily liable to the plaintiffs in this action for the money specified in the note, or in their bill of particulars, which was for money lent and for money had and received.

The note in suit came into existence as follows: Prior to 1871 a joint stock corporation had done business in Danbury under the name of the Bartram & Fanton Sewing Machine Company. This company was not prosperous. The plaintiffs loaned it \$8,000, and took the note of the company guaranteed till paid by certain persons, one of whom was Andrew Hull, one of the defendants. A payment of \$1,000 was made on it by the company. A new joint stock corporation was projected, of much larger stock than the old one.

The object of the new company was to assume the liabilities and prosecute the business of the old company. Most of the stockholders of the old company became subscribers to the stock of the new. Charles Benedict subscribed for \$5,000 of this stock, and paid for the same in cash at its par value. The defendants were also subscribers. The subscriptions were not to be binding unless \$250,000 was subscribed within a certain time. This limitation had nearly expired, and \$30,000 of the stock remained unsubscribed for. Benedict had taken no active part in getting up the new company, except to take \$5,000 of its stock. The defendants, and others of the prominent subscribers, applied to him under these circumstances to take the \$30,000 of the stock. He was in no condition to do so, either pecuniarily or in business capacity, and declined to make any further subscription. To induce him to do it the defendants and others of the subscribers promised to give him, and in fact did give him, a

bond indemnifying him against all liability by reason of his subscribing for the \$30,000 of the stock of the new company. This bond was signed by the defendants and fourteen other stockholders. Under these circumstances Benedict subscribed the \$30,000, with the understanding and agreement between him and the obligors that he was no more than trustee of the stock for the obligors, and that, if money was called for to pay for the same or any part thereof, the obligors were to meet the call and pay the money, and that he should be saved from doing so, and in all respects held harmless.

The plaintiffs afterwards desired payment of the \$7,000 remaining due on the note of the old company, and were about to proceed to collect the same, when the following arrangement was made regarding it, Benedict in no way moving in the matter except at the solicitation of the defendants, acting for the most part through the defendants Seeley and Hull. Seeley called on Benedict and informed him that the note was being pressed for payment, and that it could be arranged by substituting his note for it, which the defendants would guarantee, and that he should have no trouble with it; that he would be safe under the bond; that this would give the defendants time to sell the \$30,000 of the stock subscribed for by him, and an opportunity to pay the note from the sale. Benedict did not however consent to sign the note at this time. Seeley thereupon drew the note in suit, and put it into the hands of the defendant Hull for the purpose of having him procure Benedict to execute it. Hull called on Benedict at his residence and introduced the subject of his executing the same. Benedict was averse to doing anything about it, and informed Hull that he thought he ought not to sign the note; Hull assured him that he would be indemnified in so doing by the bond; that he himself and all the other defendants would sign their names on the back of the note for his protection, and that the note should not go out of his hands till all the defendants had so signed their names upon it; that if he would sign the note he should never be called on to pay it, and that the defendants would pay it. Benedict thereupon signed the note, and Hull took it and immediately procured

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each of the defendants to sign his name on the back of it, to the following guarantee endorsed thereon: "For value received we jointly and severally guarantee the within note to be good and collectible until paid."

These facts regarding the execution of the note by Benedict were fully known to all the defendants when they signed their names on the back of the note, and to the plaintiffs when they took the note, and gave up for it the note of the old corporation, as hereinafter stated.

The note in suit, thus signed on face and back, was by the defendant Hull delivered to the defendant Seeley, who exchanged it with the plaintiffs, and took for it from them the note of the old company. The delivery of the note to the plaintiffs in exchange for the old note was with the knowledge and assent of the defendants, and was sanctioned and ratified by them. Thereupon Seeley, who was financial agent and manager of the new company, without authority from Benedict put the amount of the note to the credit of Benedict, on account of the subscription for the \$30,000 of the stock. Seeley thus of himself treated the note in suit as so much cash paid by Benedict towards the \$30,000 subscription. A certificate for \$7,000 of the new company's stock was delivered to him.

The plaintiffs took the note in suit under a promise made by the defendants to both the plaintiffs that they would soon pay the same. And subsequently, after the note had matured, the defendants frequently promised to pay it, and never refused to do so till this suit was brought.

When the first interest fell due on the note in suit the defendant Seeley paid it. Benedict has always repudiated his liability on the note and on his subscription for \$30,000 of the new stock, and Taylor, one of the plaintiffs, as counsel for Benedict, advised him not to pay the note, and that it would be bad faith in the defendants to attempt to subject him on it.

Upon these facts the case was reserved for the advice of this court.

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W. F. Taylor and *H. S. Sanford*, for the plaintiffs.

1. The finding shows that the original company owed the plaintiffs for money loaned the sum of \$7,000, for which the plaintiffs held the notes of the company, payable to the plaintiffs, and guaranteed by Andrew Hull, one of the defendants. It also appears that the defendants were owners to a large amount of the capital stock of the company, and were obligated to the company in a sum far exceeding in amount the claim of the plaintiffs. Also that an arrangement was made by all parties, under which the defendants were to pay the plaintiffs the claim due them, and the defendants were to be credited by the company therefor on the indebtedness due from them to the company. In accordance with this arrangement the plaintiffs extinguished their claims against the old company, taking in lieu thereof the promise of the defendants to pay the amount of their claim. The defendants thereupon applied the claim of the plaintiffs towards the extinguishment of their own obligation to the company, and received the full benefit of the same to their individual advantage. This was an accord executed and was legally binding on the defendants. 1 *Parsons* on Cont., 187, 188, and note *t*; *id.*, 191; *Wilson v. Coupland*, 5 Barn. & Ald., 228; *Thompson v. Percival*, 5 Barn. & Adol., 925; *Heaton v. Angier*, 7 N. Hamp., 397; *Cross v. Richardson*, 30 Verm., 641; *Presbyterian Society v. Staples*, 23 Conn., 557; *Reed v. Holcomb*, 31 *id.*, 360; *Packer v. Benton*, 35 *id.*, 349.

2. During the course of this arrangement, and as collateral security for the payment of the claim, the note for \$7,000, signed by Benedict and guaranteed by the defendants, was executed. To properly show this original agreement, and only as a part of it, the Benedict note was offered in evidence, together with parol and other evidence, all forming a part of the original agreement and explanatory of it—all showing that the defendants were primarily liable. This could be shown by parol evidence, even though the guaranty of the defendants on the note was a collateral obligation; provided the guaranty was made at the same time and became an essential ground of the credit given to the principal or direct debtor.

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3 Kent Com., 122; *Leonard v. Vredenburg*, 8 Johns., 29; *Bailey v. Freeman*, 11 id., 221; *Nelson v. Dubois*, 13 id., 175; *D'Wolf v. Rabaud*, 1 Pet., 476; *Hunt v. Adams*, 5 Mass., 358. The defendants admit their liability on the note as guarantors; but in case they are obliged to pay they clearly cannot recover of Benedict, and from the finding they are bound to pay and save Benedict harmless, not only from all pecuniary loss, but also from any inconvenience or trouble by reason of the same; and to force a suit to be brought against Benedict on the note would be a fraud on him.

3. This claim of the plaintiffs can be recovered in this action under the common counts for money had and received or on an account stated. 1 Parsons on Cont., 188 and note, 191 and note; *Wilson v. Coupland*, supra; *Thompson v. Percival*, supra; *Beecker v. Beecker*, 7 Johns., 103; *Holly v. Rathbone*, 8 id., 148.

L. D. Brewster and S. Tweedy, contra.

LOOMIS, J. The claim which the plaintiffs in this action seek to recover of the defendants was originally against The Bartram & Fanton Sewing Machine Company, a joint stock corporation, for a loan of \$8,000, evidenced by the promissory notes of the corporation. After paying \$1,000 on the notes a new corporation was formed, called "The Bartram & Fanton Manufacturing Company," with a larger capital, which was to assume the liabilities and prosecute the business of the old company. The subscriptions to the stock of the new company were not to be binding unless they aggregated a certain amount in a specified time. The time had nearly expired, and \$30,000 remained to be subscribed in order to fill the condition. Benedict, who had already subscribed for \$5,000 of the stock, was urged to subscribe for the remaining \$30,000, and to induce him so to do the seven defendants, together with fourteen other persons, all subscribers to the stock, promised to execute, and did so execute and deliver to him, a bond of indemnity, as set forth in the finding, which Benedict accepted, and subscribed for the amount remaining.

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After this the plaintiffs demanded of the new company payment of the notes held by them against the old company, and were about to enforce the collection when the defendants, being interested as stockholders in the new company, arranged the matter between the plaintiffs and the corporation by a new note dated November 25th, 1871, for the amount due the plaintiffs, signed by said Benedict, payable to the plaintiffs on demand, with interest semi-annually and the taxes, which note was guaranteed by the defendants as follows in writing on the back of the same:—"For value received we jointly and severally guarantee the within note good and collectible until paid."

The finding of facts contains a detailed statement of the negotiations which resulted in the above arrangement, and of the verbal promises at the same time made by the defendants, both to Benedict and to the plaintiffs, that they would pay the note.

It is very clear that the plaintiffs might have had, and perhaps may still have, a good claim against the defendants on their guaranty. But for purposes of the present suit this claim is abandoned, and no recovery is sought except under the common counts, predicated solely on some primary and original liability on the part of the defendants.

In abandoning the sure ground of the written guaranty, it seems to us that the plaintiffs are surrounded with legal difficulties that are insurmountable.

1. If the relations of the parties and the obligations resting on the defendants are to be determined by the note and guaranty, it must be conceded that no recovery can be had under the common counts. The note and guaranty as against the defendants are not competent evidence. The guaranty is a special contract that the note will prove good and collectible until paid, and in order to recover on it there must be a special count alleging the contract and a breach of it, which must be proved by relevant evidence. 2 *Saunders' Pleading and Evidence*, 545; *Mines v. Sculthorpe*, 2 Camp., 215; *Carney v. O'Neil*, 27 Mich., 495.

The ground for the admissibility of promissory notes as

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evidence under the common counts is, that a presumption arises from the promise to pay money, that money has been received. *Brooks v. Holland*, 21 Conn., 888. But surely no such presumption, and indeed no presumption at all, as against the promisor, arises from a mere warranty that a note is good and collectible.

2. But the plaintiffs say that with the aid of parol evidence they have shown that the defendants whose names are written on the back of the note, ostensibly as guarantors, were not in fact such merely, but were really makers of the note.

But the difficulty here is, that such a fact cannot be shown by parol without utterly abrogating one of the most thoroughly established and important rules of evidence—that “no parol evidence is admissible to contradict, vary, or explain a written contract, or to show it to be different from what it purports to be on the face of it,” except in case of ambiguity. 1 Swift Dig., 187; 1 Greenl. Ev., § 275; *Dale v. Gear*, 38 Conn., 15; *Worcester County Institution for Savings v. Davis*, 13 Gray, 531.

There is an anomalous class of cases where a third person, neither payee nor maker, puts his name on the back of a note before its indorsement by the payee, where by parol evidence such person may be held liable either as original promisor, guarantor or indorser, according to the nature of the transaction and the understanding of the parties. *Bryant v. Eastman*, 7 Cush., 113; *Benthal v. Judkins*, 13 Met., 267; *Good v. Martin*, decided by the Supreme Court of the United States, and reported in the American Law Register for February, 1878, p. 111.

But in all these cases the indorsement is in blank, and there is no written contract, and none is definitely implied by law from the indorsement.

In cases of blank indorsements, where the contract is implied by law, it has the same effect as if written, and parol evidence is not admissible to contradict or vary it, as in the cases of *Dale v. Gear*, supra, *Bigelow v. Colton* and *Lake v. Stetson*, 13 Gray, 310. The Supreme Court of Massachusetts,

in the recent case of *Allen v. Brown*, 124 Mass., 77, held that parol evidence was not admissible to show that indorsers who indorsed a promissory note before delivery to the payee, were accommodation indorsers or sureties only. See other cases to the same effect cited in the opinion by Soule, J.

3. Again, the plaintiffs, by wholly ignoring the existence of the note and written guaranty, except as forming an item in the history of the case, propose to hold the defendants on their mere verbal promise.

Allowing the plaintiffs to have their way in this regard, the statute of frauds would be troublesome, to say the least, and the want of consideration proved would be an insuperable objection.

But the true and sufficient objection to this claim is, that by the rules of law the written contract, being clearly expressed and deliberately made, cannot be ignored, for "it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing. After this, to permit oral testimony, or prior, or contemporaneous, or subsequent conversation, in order to learn what was intended or contradict or vary what is written, would be dangerous and unjust in the extreme." *Glendale Manf. Co. v. Protection Ins. Co.*, 21 Conn., 37; 1 Greenl. Ev., § 275.

4. Some of the legal principles before mentioned also stand in the plaintiffs' way when they would invoke the aid of the doctrine of novation. In the place of the written evidence of the defendants' undertaking, they must substitute by parol evidence another contract, whereby the defendants directly assumed upon themselves the payment of the plaintiffs' debt against the corporation. And besides this, even the parol evidence fails to make out some of the essential elements of novation. Not only must it appear that the corporation owed the plaintiffs, but that the defendants owed the corporation, and that by the new arrangement between the parties the two original debts were absolutely discharged.

It is not even found that the defendants owed any debt to the corporation, and of course no such debt was discharged.

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It is not found that the plaintiffs' debt against the corporation was discharged. It is found that the original notes were given up, which is evidence tending to show such a fact, but is by no means equivalent to finding a discharge.

5. Finally, we mention as one fatal objection to all modes of charging the defendants primarily with this debt, under the common counts, the want of consideration moving from the plaintiffs to the defendants. The court expressly finds "that there was no evidence of such consideration except as hereinafter appears." In the detailed statement of facts which follows, no such consideration is disclosed. As we have already seen, not a dollar of money or property ever passed (or was ever promised) from the plaintiffs to the defendants. All went to the corporation alone. It is true that the defendants were stockholders; but as such they had no legal identity with the company, but were in contemplation of law as much strangers and third persons as if they had never heard of such a corporation. Undoubtedly they took a deep interest in the success of the corporation, and what they verbally said and promised is to be construed with reference to this fact, and also with especial reference to the principal fact, that the Benedict note with the written guaranty of the defendants was accepted by the plaintiffs, and must have been regarded by all parties as embodying all the essential parts of the transaction.

A consideration is attempted to be shown in the fact that the amount of the old notes, given up by the plaintiffs, when the guaranteed note of Benedict was delivered to them, was afterwards credited as so much cash on Benedict's subscription, which it is said had the effect to reduce by so much the liability of the defendants on account of that subscription. There are several answers to this claim.

In the first place, it must be borne in mind that the liability referred to was a mere contingent liability, and was entered into not by the defendants merely, but by fourteen other persons, in no way concerned in this transaction, and that the nature of that liability is not to be determined by parol evidence, but by the written condition of the bond given to

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Benedict. By the terms of the condition of this bond it will be seen that there was no obligation on any of the signers to pay Benedict any thing until he had first been compelled to pay upon the call of the directors, and then only upon the express proviso that Benedict should transfer to the person or persons so re-paying him a proportionate amount of the stock standing in his name.

These provisos were not complied with, and there was no certainty that any liability would ever accrue under that bond, for Benedict might choose to keep the stock himself, and pay for it without looking to the obligors for reimbursement.

But another conclusive answer is, that it nowhere appears that at the time of the execution and delivery of the Benedict note to the plaintiffs, there was any understanding or agreement whatever that the amount of the note should be credited on Benedict's subscription; and the defendants are in no way responsible for that application of the note.

The finding is explicit on this point; the language is as follows:—"Thereupon Seeley (who was financial agent and manager of said new company) without authority from Benedict put the amount of the note in suit to the credit of Benedict on account of the subscription made as aforesaid by him for said \$30,000 of the stock of said new company." Seeley thus, of himself, treated the note in suit as so much cash paid by Benedict towards his \$30,000 subscription to the stock of the new company.

For the foregoing reasons we advise judgment for the defendants.

In this opinion the other judges concurred.

Buxton v. Broadway.

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JONATHAN BUXTON vs. ORMAN BROADWAY.

A petition in equity averred that the respondent had by fraudulent representations obtained of the petitioner his note and had brought an action upon it, and prayed for the cancellation of the note and a perpetual injunction against the prosecution of the action. The note was non-negotiable, was dated in June, 1872, and had seventeen years to run from its date. The petition was brought in December, 1873. The respondent demurred to the petition on the ground that the petitioner had adequate remedy at law by a defence to the pending action. Held that, as the petitioner had no control over the action at law, but the respondent might withdraw it and wait several years before bringing another, the remedy at law was not adequate.

BILL IN EQUITY for the cancellation of a note and an injunction against the prosecution of an action at law upon it; brought to the Superior Court.

The bill alleged that the note was obtained by fraudulent representations, which were particularly set forth; that it was for \$458.61, was dated June 10, 1872, and was payable to the respondent on demand with interest from date; that an action at law had been brought upon it by the respondent against the petitioner in the Court of Common Pleas of Fairfield County, which action was still pending; and that the petitioner had not adequate remedy at law; and prayed for a decree that the note should be canceled and delivered up to the petitioner, and that the respondent should be perpetually enjoined against the prosecution of his action upon it.

The respondent demurred to the petition, and the case was reserved upon the demurrer for the advice of this court.

J. H. Olmstead and *E. S. Schofield*, in support of the demurrer.

1. A court of equity will not relieve where there exists an adequate remedy at law; this is prohibited by positive legislative enactment.

2. The petitioner has a complete legal remedy by a defence to the action on the note. The petition alleges that the note was obtained by fraud and was without consideration. Both these matters are good defences at law.

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3. The note is non-negotiable on demand. An assignment by the respondent cannot affect the right of the petitioner to defend against its infirmities in the hands of a third person.

4. The petitioner does not allege, except in general terms, that the petitioner has not a remedy at law, nor that any unconscionable advantage is to be gained or is attempted by the respondent in his action on the note, nor that the petitioner has been deprived of his defence at law or is in danger of being deprived of it. Courts of equity are reluctant to interpose their summary authority by injunction to restrain proceedings at law unless one of the above reasons exists. *Roberts v. Ripley*, 14 Conn., 553; *Bigelow v. Hartford Bridge Co.*, id., 580; *Phalen v. Clark*, 19 id., 435; *Pearce v. Olney*, 20 id., 553; *Thompsonville Scale Co. v. Osgood*, 28 id., 19.

J. B. Curtis and S. Fessenden, contra.

PARK, C. J. If the petitioner could compel the respondent to prosecute to final judgment the suit he has commenced on the note in question, then it might be said with truth that he has adequate remedy at law for the grievances set forth in his bill. But the petitioner has no such power over the respondent or the suit; neither does the law furnish him any means of acquiring it. The suit is under the entire control of the respondent, who may withdraw it at any time before the verdict of a jury or a finding of the facts by the court; and, abiding his time, he may take an unconscionable advantage of the petitioner when his witnesses are dead or have been scattered to parts unknown, or when the facts with regard to the fraud shall have faded from their memory. The note has seventeen years of life from its date; and if it be true, as is set forth in the bill, that it was obtained from the petitioner by fraud, it may well be expected that the respondent will use all the means in his power to prevent the petitioner from exposing its character on the day of trial; and to this end he will take all the advantage to be gained by delay to accomplish his purpose. It is clear therefore that we cannot take into account the fact that there is a suit at law now

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pending between the parties in determining whether the petitioner's remedy at law is "obvious, adequate and complete." CHURCH, J., in *Chipman v. City of Hartford*, 21 Conn., 488. On that question we can consider only what means of redress the law itself furnishes the petitioner, and not what he may chance to get through the indulgence of the respondent. In the case of *Ferguson v. Fisk*, 28 Conn., 501, which was a suit in chancery to compel the respondent to cancel and deliver up a draft, the consideration of which had entirely failed, a suit at law, brought to recover the amount of the draft, was at the time pending between the parties. Still Judge SANFORD, in giving the opinion of the court, regarded the fact of no importance, and dismissed it with the remark that the suit might at any time be withdrawn by the respondent and another brought at his convenience. The fact of the pendency of the suit at law in the present case, though strenuously urged upon us in the argument, we lay out of our consideration, in view of the fact that it may be withdrawn by the respondent at his pleasure, and another brought at a time when an unconscionable advantage may be taken of the petitioner.

If the note in question showed upon its face the fraud alleged in the bill, so that however late a suit might be brought the petitioner could not be deprived of his defense, it might with some propriety be said that the petitioner has adequate remedy at law. Judge Story, in the second volume of his *Equity Jurisprudence*, § 700 *a*, says:—"Where the illegality of the agreement, deed or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity to direct it to be canceled or delivered up would not seem to apply; for in such a case there can be no danger that the lapse of time may deprive the party of his full means of defense." It would seem to follow that if the illegality did not appear upon the face of the instrument, courts of equity would interfere and order a cancellation of it. Indeed, in section 700 of the same volume the author says:—"If an instrument ought not to be used or enforced, it is against

conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose, to the injury of a third person. * * If it is a mere written agreement, solemn or otherwise, still, while it exists, it is always liable to be applied to improper purposes; and it may be vexatiously litigated at a distance of time when the proper evidence to repel the claim may have been lost or obscured; or when the other party may be disabled from contesting its validity with as much ability and force as he can contest it at the present moment." This language applies with peculiar force to the case in hand; for no one will say that the petitioner will be as able to prove the allegations in his bill ten years hence as he is to-day. The burden of proving the fraud would be on the petitioner at whatever distance of time a suit might be brought; hence the petitioner would lose and the respondent would gain by delay. The same author, in section 695 of the same volume, in classifying the cases in which courts of equity will interfere and order the cancellation of instruments, places cases of the character of the present one in the first class. He says:—"First, where there is actual fraud in the party defendant, in which the party plaintiff has not participated." The bill charges the respondent with actual fraud in procuring the note in question of the petitioner. Hence the case comes clearly within this class.

The case of *Ferguson v. Fisk*, before referred to, does not differ in principle from the present one, but substantially controls it. That was a case where the consideration for giving the draft had entirely failed. This is a case of fraud in procuring the note. The draft in that case was negotiable, but past due. The note in this case is non-negotiable. A decree of cancellation was passed in that case, and one should be in this, if the allegations in the bill shall be proved true.

We advise the Superior Court that the bill is sufficient.

In this opinion the other judges concurred; except CARPENTER, J., who dissented.

CHARLES HULL vs. SEELEY HARRIS.

Pending a proceeding for contempt in disobeying an injunction against the diversion of water from a spring, the plaintiff and defendant entered into an agreement by which the proceeding was to be continued to a future day, and the defendant was to use all practicable means to restore the stream, to pay the plaintiff his expenses in the suit, and also to pay him such damages as they should agree on, or, if they could not agree, as should be fixed by a referee, and after their payment to give the plaintiff a bond with surety that his right to the water should not be disturbed; and when this was done the proceeding was to be withdrawn. The defendant restored the stream so far as it could be done and paid the expenses of the suit, but did not pay the damages nor give the bond. It appeared however that, for the purpose of settling the damages, he had called on the plaintiff for a statement of his claim with regard to them, which the latter refused to give. Held that the defendant was not liable to a judgment for contempt.

MOTION for an attachment for a contempt, filed in the Superior Court, and heard before *Sanford, J.* Judgment that the defendant was guilty of contempt. Motion in error by defendant. The case is sufficiently stated in the opinion.

W. F. Taylor and *H. S. Sanford*, with whom was *W. K. Seeley*, for plaintiff.

L. D. Brewster and *S. Tweedy*, for defendant.

PARDEE, J. In 1872 Hull, by virtue of a right vested in him, was conveying water from certain springs and reservoirs situated upon the land of Harris, by pipes, and selling it to various persons in Danbury, gaining profit thereby. Harris, having threatened to interrupt the flow of water through the pipes, the Superior Court for Fairfield County, at the August term, 1872, enjoined him against carrying his threat into execution; disregarding this, on the 10th day of November, 1874, he dug trenches near the springs in such manner as partially to divert the water from the pipes and thereby caused loss and damage to Hull; thereupon he was cited to appear before the court on the 18th day of the same month to show cause why he should not be punished for contempt. Upon the next day the parties made a written agreement as follows:

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"1st. The suit now pending in the Superior Court and which has been partially heard, shall be continued until such a day in December, 1874, as may be fixed by Judge Martin.

"2d. That said Harris shall at once attempt and use all possible means for the return of the flow of water into the springs, reservoir and pipes of said Hull, in as full and ample manner as before the injury, at his own expense, and that the same shall be permanently so fixed.

"3d. That said Harris shall pay to said Hull all his expenses in conducting said suit, including lawyers' fees.

"4th. If said Hull and Harris cannot agree upon the amount of damages to be paid to said Hull, then Judge Martin is to fix the amount.

"5th. Said Harris agrees that said Hull may at all times go upon his land for the purpose of repairing pipes, excavating, &c., without being confined to any particular route, doing as little damage as possible.

"6th. Should the above agreements be performed and the amount of damages agreed upon be paid, then, upon giving a bond by said Harris with sufficient surety, binding his and their heirs and assigns to said Hull, his heirs and assigns, that his rights in and to said springs of water, reservoirs and pipes, and the free and uninterrupted flow of the water into and through the same, and his passage over said land when necessary for the purpose of repairs or to remove obstacles, shall never be molested, said suit now pending shall be discontinued; this being a mere memorandum agreement subject to such alterations and changes as may be necessary to carry the intention of the parties into full effect."

Within a reasonable time after the execution of this agreement Harris attempted fairly, honestly, and in perfect good faith, to restore the water to the springs, reservoirs and pipes. In January, 1875, he paid to Hull \$223.69, being the amount of his expenses in prosecuting the motion for contempt, including lawyers' fees. He then demanded from Hull a statement of his claim for damages from the loss of water by the diversion, which statement Hull has at all times refused to give or make. Harris has never executed, and Hull has

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never required or requested the execution of, the bond named in the fifth article.

The Superior Court at the February term, 1877, adjudged and decreed that Harris was guilty of contempt in violating the injunction, and that he should pay a fine of ten dollars to the state of Connecticut and the costs of the application to Hull, and in default of payment of either should stand committed until he complied.

He thereupon filed a motion in error, specifying several errors, one only of which it is necessary to state, namely: "In deciding that the agreement entered into by the parties by the consent of the court and carried out by the respondent and the petitioner, was not in full purgation of the contempt, if committed; and in not holding that the petitioner is clearly in fault for its not being carried out in full."

This exception is well taken. Harris, being in court upon a citation to show cause why he should not be punished for contempt, Hull could have insisted upon subjecting him to the full rigor of the law; but thinking, doubtless, that he could secure a more complete restoration of the privileges of which he had been deprived and a more satisfactory compensation for the injury resulting from the temporary deprivation, chose, with the consent of the court, to take his cause from the forum of law and make it a matter of private negotiation and contract between himself and his opponent. Accordingly he stipulated that if Harris would do certain acts he would no further press the suit against him. Having made a contract he is bound to performance on his part. He required Harris to pay the damages resulting from the diversion of water; providing also that if they could not agree the amount should be determined by a referee. The damages from the nature of the case could be known only to Hull; the legal import of his contract is that he shall state them to Harris—that he shall make it possible for him to pay. He has bound himself not to go into court until he has given Harris an opportunity to agree with him; and agreement as to unliquidated damages is impossible so long as the claimant refuses to open his mouth. He has contracted to give Harris an opportunity

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both to agree and to pay before he will subject him to the expense either of a referee or of further proceedings in court; his refusal to state prevents payment; by stating, he can at any moment be paid or put Harris in the wrong. Having taken himself out of court by contract he cannot be heard there again until he can show such performance on his part as entitles him to that privilege. In this state of things the failure of Harris to give security for future good behavior is unimportant; this would be but an idle labor so long as Hull bars the way to a complete performance by Harris of all the requirements of the agreement; presumably, if he can be allowed to pay, he will complete his defence by filing the bond.

There is error in the judgment complained of.

In this opinion the other judges concurred.

PHILO H. WELLER vs. DUDLEY P. ELY.

The plaintiff purchased in good faith two watches, which afterwards proved to have been stolen from *D*. The supposed thief being arrested and put on trial in the city of *N*, the watches were, upon the request of the chief of police of the city, and with the consent of *D*, delivered to the former, for use upon the trial and for identification, the plaintiff requiring that they be returned to him if not identified to his satisfaction. He was not satisfied with the identification claimed. They were afterwards delivered to the mayor of the city, to be held by him for identification under a provision of the city charter. The plaintiff, having demanded them of the mayor, brought replevin for them. It was found in the suit that they were the property of *D*. Held that the plaintiff had no such right to the watches as would enable him to maintain the suit.

Whether while in the hands of the mayor, under the ordinance which required him to hold the property until identified, and which was authorized by the charter, the property was not in the custody of the law, and rightfully retained by him: *Quere*.

REPLEVIN for two watches and a chain, claimed to be unlawfully withheld; brought to the Court of Common Pleas for

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Fairfield County, and reserved, upon a finding of the facts, for the advice of this court. The case is sufficiently stated in the opinion.

G. Stoddard, for the plaintiff.

M. W. Seymour, with whom was *N. J. Taylor*, for the defendant.

GRANGER, J. The property described in the plaintiff's writ of replevin consisted of two watches and one chain, all of the value of about two hundred dollars, and belonged to one Samuel S. Dale, of the city of New York, from whom the same were stolen about the 1st of January, 1874, and he has ever since continued to own the same. After the property was stolen it was, by some person unknown, and without any authority from Mr. Dale, pawned in New Haven, in this state. The plaintiff Weller purchased it from the pawn broker, for one hundred and eighty dollars, having no knowledge that it was stolen. He kept it till December 25th, 1876, when he was informed by the chief of police of Norwalk, and by Mr. Dale, that it was supposed to be stolen, and that a certain person had stolen it, and that they wished to take it to South Norwalk where this person was being prosecuted for the theft, for the purpose of using it in the prosecution, and of identifying it as stolen property. The plaintiff thereupon delivered the property to the chief of police for the above purpose, and took from him and from Dale a receipt worded as follows:

"Bridgeport, December 25th, 1876.

"Received from P. H. Weller two watches and chain.

(Signed) John N. Tuttle, Chief of Police.

"Samuel S. Dale,

"S. Most."

Weller, at the time he delivered the property, required that it should be returned to him in case it should not be identified at the trial to his satisfaction. He was not satisfied with the identification. The property was delivered by the chief of police to the defendant, the mayor and chief magistrate of

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South Norwalk, and the defendant as such mayor, by virtue of an ordinance passed pursuant to the charter of the city, took the property into his possession, and was holding it as property alleged to be stolen, for the purpose of evidence, and in order that the same might be identified and its ownership ascertained, at the time this action was commenced. The plaintiff demanded the property before suit was brought. The defendant refused to deliver it, and claims the right to hold it under the city ordinance, and under the circumstances above stated.

The ordinance referred to provides that the chief of police shall cause a record to be made of all property coming into the hands of the police, whether stolen, found, or detained for evidence, and also that property found by the police shall be reported to the chief, who shall make a memorandum of the articles, which shall be sworn to by the officer or officers finding the property, and the memorandum and the property be given to the mayor, and no property thus acquired by the police shall be delivered to the claimant or owner without the consent of the mayor.

It is manifestly the object of this ordinance to protect the property stolen for the benefit of the true owner; and also to promote the ends of public justice, and the execution of the laws of the state, and it is not its purpose to divest the owner of any right. This property at the time the suit was instituted was held by the defendant as mayor under this ordinance, and might well be considered to be *in custodia legis*, and if the maxim is true that the law works no man any injury, then the plaintiff has sustained no injury in this case, and his property has not been wrongfully detained from him in any manner.

But however this may be there is an obvious reason why the plaintiff cannot recover in this action. The action of replevin is regulated entirely by statute, and in order to sustain it the plaintiff must show that he has a general or special property in the goods, with a right to their immediate possession, and that they are wrongfully detained from him. Gen. Statutes, p. 484, sec. 1. The case as found by the court

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below, instead of showing any of these essential elements, constituting a right of recovery in the plaintiff, shows that none of them existed. The property was stolen property, it belonged to and was owned by Dale, and the plaintiff never had any right or title to it as against him. But it is claimed that the plaintiff had the right to the possession of the goods, and that this right has been invaded by the defendant. We see no foundation for any such claim. Whatever right of possession he had he surrendered it to Dale, the true owner, and Tuttle, the police officer. The goods, with the consent of Dale, went into the hands of the defendant, and it may properly be said that the defendant held the property as the agent of Dale, at the time the suit was brought. The plaintiff can have no lien upon the goods as against Dale, and the possession of them could be of no possible benefit to him, as he could not hold them against Dale if possession should be awarded to him.

We think the plaintiff has entirely failed to show any cause of action against the defendant, and we advise the Court of Common Pleas to render judgment for the latter.

In this opinion the other judges concurred.

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MARGARET MOOTRY AND ANOTHER *vs.* THE TOWN OF DANBURY.

Where a town does an act lawful in itself in such a manner as to create a nuisance, it is liable in the same manner that an individual would be.

The authorities of a town built a bridge in such a manner as to set back the water of the stream upon the plaintiffs' land. Held that the town was liable to the plaintiffs for the damage done.

Where a declaration in an action on the case against a town for so constructing a bridge as to set the water back upon the plaintiffs' land, contained no averment that there was negligence or unskillfulness in the construction of the bridge, it was held to be a matter of form, the want of which could not be taken advantage of on general demurrer.

ACTION ON THE CASE against the defendant town, for con-

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structing a bridge and road in such a manner as to set the water of a stream back upon the land of the plaintiffs; brought to the Court of Common Pleas of the county of Fairfield.

The principal allegations of the declaration were as follows: that on the first day of May, 1871, the plaintiffs were, and ever since have been, the lawful owners and possessors of a certain tract of land situated on the south side of West street, in the town of Danbury, containing about one acre of land, with two dwelling-houses and other buildings standing thereon, and bounded and described as follows, [describing it;] with a stream of water running over and through the west side of said land, and across said highway called West street, which said highway was below the above described land on said stream of water, and it became, was and still is the duty of said town of Danbury to build, keep and maintain a bridge over and across said stream of water on said highway for the accommodation of the public travel; and the plaintiffs say that the defendants, well knowing the premises, but contriving to injure the plaintiffs, on or about the said first day of May, did construct, build and repair a bridge over and across said stream of water, in and upon said highway and below the said land of the plaintiffs, and have continued and maintained said bridge as the same was then constructed without any material alteration thereof to the present time; and the plaintiffs say that the defendants constructed said bridge very much narrower than the bed of said stream, and much narrower than the space that the said stream had before that time occupied and had been accustomed to flow over, and wholly insufficient for the flow of the water of said stream, and did build a high wall on the upper side of said highway, and did raise up said highway, and did place and deposit a large quantity of stones, earth and rubbish in said highway and said stream of water, and by means thereof did obstruct, hinder and dam up the water of said stream and cause the same to flow back upon and over the said land of the plaintiffs, and to flow into the cellars and into and upon the floors of said two dwelling-houses, rendering both of said houses

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uncomfortable, unhealthy, untenable and unfit for dwelling-houses, and did thereby cause said stream of water to wash and carry away a large quantity of stones, gravel and earth from and off said premises; and in consequence thereof the plaintiffs have been unable to rent and let said premises as they could and should have done had they remained the same as they were before said acts of the defendants were committed as aforesaid; and said premises and dwelling-houses have been thereby otherwise injured and damaged.

A second count alleged that the plaintiffs were the owners of the land described in the first count, and that the highway crossed the stream at a point below the land in question, and then proceeded as follows:—

That the defendants contriving and intending to deprive the plaintiffs of the use of said land and dwelling-houses, and the rents and profits thereof, on or about the first day of May, 1871, placed and deposited a large quantity of stones and earth in and upon said highway, and in said stream of water and below the said land of the plaintiffs, and thereby raised up the said highway much higher than it had before been, and obstructed the flow of said stream so as to prevent the running of said stream in its natural channel and course, and as it had before been accustomed to flow, and to cause said stream of water to flow back and upon the said land of the plaintiffs, and to overflow the same and to run into and flood the cellars and to run upon the floors of said dwelling-houses to a great depth, and have ever since kept and continued said stones, earth and rubbish upon said highway, and in said stream of water, and obstructed the natural flow of the water of said stream to the present time, (stating the matters of damage in the same manner as in the first count.)

The defendants demurred to the declaration, and the case was reserved upon the demurrer for the advice of this court.

L. D. Brewster and *S. Tweedy*, in support of the demurrer.

1. Neither of the counts in the declaration alleges negligence or unskillfulness on the part of the defendants; both allege simply a wilful tort committed by the town. Both use

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substantially the same language as to the intent and obstructive acts of the town, made use of in the second count in the case of *Judge v. City of Meriden*, 38 Conn., 90. The decision in that case is decisive of this. In that case the court held that the city was charged with a wanton and malicious trespass, for which it would be a gross injustice to hold the inhabitants liable. It needs no citation of authorities to show that the liability of a town in this class of cases is less than that of a city. It needs no argument to prove that any municipality should be held more strictly accountable for the condition of artificial aqueducts of its own creation, than for the condition of natural water courses within its limits. Towns can not be held liable for the wanton malicious acts of their agents in the performance of a duty imposed by statute on the town, unless a right of action is given by statute. Dillon on Municipal Corp., §§ 761 to 764, 777.

2. If the old doctrine of *Chidsey v. Town of Canton*, 17 Conn., 475, and *Ball v. Town of Winchester*, 32 N. Hamp., 435, that towns are not liable for damages occasioned by acts of highway officers, but the officers themselves are to be sued, (*Rowe v. Addison*, 34 N. Hamp., 306,) is to give way to the new doctrine claimed by the plaintiffs to be so broadly announced in *Norwalk & Danbury R. R. Co. v. Town of Norwalk*, 37 Conn., 109, we submit that the plaintiffs are bound to state in their declaration—1st, by what officers or agents the act was done; 2d, whether the suit is for negligence or misfeasance; and 3d, whether the officers acted within the scope of their duty or entirely outside the same in committing the alleged injuries.

3. In the very recent cases of *Merriam v. City of Meriden*, 43 Conn., 173, and *Weed v. Borough of Greenwich*, 45 Conn., 170, this court has had occasion to examine so fully all the leading authorities on the vexed question of municipal liability that we do not propose to cite them, but to call attention to the fact that in both of these cases the defendants argued that the liability of the city and borough was no greater than that of towns, and that *therefore* they were not liable, while the plaintiffs argued that the cases concerning

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towns were wholly different from those in question, by reason of the special charters in the latter, and that *therefore* they were liable. We also refer the court to the following very recent cases: *Woodcock v. City of Calais*, 66 Maine, 234; *Lynde v. City of Rockland*, id., 309; *Sherman v. City of Grenada*, 51 Miss., 189. In the last case the decision in *Judge v. City of Meriden* is cited as in accord with the whole line of decisions in that state.

4. Finally we claim that the doctrine of *Chidsey v. Town of Canton* still prevails in this state.

O. A. G. Todd, contra.

1. The duty of towns to keep their highways and bridges in repair is imperative. Rev. Statutes, p. 231, sec. 1; *Danbury & Norwalk R. R. Co. v. Town of Norwalk*, 37 Conn., 109, 119.

2. When such repairs are made by an officer or agent of the town for the benefit and by direction of the town, no exemption from liability by the town can be interposed, when from negligence or willfulness they are so made as to produce unnecessary damage to other parties. *Perry v. City of Worcester*, 6 Gray, 544; *Sprague v. City of Worcester*, 13 id., 193; *Rochester White Lead Co. v. City of Rochester*, 3 N. York, 463; *Mayor &c. of New York v. Bailey*, 2 Denio, 433; Shearm. & Redf. on Negligence, § 144, and cases cited in notes. Towns are liable for such an injury in a civil action by the party injured, in the same manner as individuals and private corporations. *Danbury & Norwalk R. R. Co. v. Town of Norwalk*, 37 Conn., 119.

3. The declaration clearly sets up negligence in not building the bridge of sufficient width to carry off the water, and in filling up the road so as to obstruct the passage of the water. It is not necessary to use the word "negligence" in framing a declaration if the acts set out show negligence. *Munson v. Town of Derby*, 37 Conn., 298.

CARPENTER, J. This case stands upon a general demurrer to the declaration. The first count alleges that it is the duty

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of the town to build, keep, and maintain a bridge over and across a stream of water on a highway; that it did construct and build the same below the plaintiffs' land very much narrower than the bed of the stream and wholly insufficient for the flow of water, and raised the road bed across the stream in such a manner as to obstruct the flow of water and to dam up the same, and cause it to flow back upon the plaintiffs' land, thereby doing damage, etc.

There is no allegation *in terms* of negligence or unskillfulness in the construction of the bridge.

From this omission it is claimed that the declaration is, in substance, for a willful and malicious injury. Thus construed the case of *Judge v. City of Meriden*, 38 Conn., 90, is cited to show that a municipal corporation cannot be liable in such an action. We do not so interpret the declaration. We think that it clearly charges the defendants with negligence and unskillfulness in the construction of the bridge and the highway over the stream; in constructing it in such a way that there was not sufficient space to allow the water to pass off freely, thereby causing it to set back upon the land of the plaintiffs. The essential elements of a good cause of action are in the declaration; the omission to say in so many words that the defendants were guilty of negligence, when the court can see from what is stated that negligence did exist, is a defect in form and not of substance, and therefore is not reached by a general demurrer.

But a more important question, and the real question in the case, is, whether the defendants are liable for such an injury.

The only case in this state cited by the defendants in support of their claim that they are not liable, is *Chidsey v. Town of Canton*, 17 Conn., 475. That was an action against the town for damages sustained by the husband and father, in consequence of an injury to the persons of his wife and daughter, caused by a defective bridge. The court held that, while such damage (the loss of service, expense of nursing, &c.) was damage to property in a certain sense, yet it was not such property as the statute contemplated, and that there-

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fore the town was not liable. The case turned wholly upon the construction given to the statute—that it did not extend to this species of property.

The application of the principle of that case to this is not very apparent. There was there a defect in the bridge and railing which endangered travelers. Here there is no such defect. The negligence consists, not in leaving the road bed defective and dangerous, but in constructing it improperly and thereby causing injury to adjacent property. In that case the statute expressly made the town liable for injuries caused by a defective bridge to certain kinds of property therein enumerated. The court held that the species of property injured in that case was not embraced in the statute. That statute was designed to enforce the duty of keeping the road bed in a suitable condition to accommodate the public travel. In strictness it has no application to this case. It makes towns liable for injuries resulting from a neglect to do what the statute requires, and has no reference to injuries resulting from negligence in doing what is required improperly.

The liability of the defendants therefore, if liable at all, must rest upon broader grounds than that statute. The statute simply compels them to do by making them liable in damages if they fail to do. A principle of universal application—that every man shall transact his lawful business in such a manner as to do no unnecessary injury to another—compels them to do what they are required to do in a proper manner. In other words, towns will not be justified in doing an act lawful in itself in such a manner as to create a nuisance, any more than individuals. And if a nuisance is thus created, whereby another suffers damage, towns like individuals are responsible. Keeping this distinction in mind let us briefly refer to some of the recent utterances of this court. In the case of *Young v. City of New Haven*, 39 Conn., 435, the defendants were macadamizing a street and used a steam-roller. It was left over Sunday near the part of the highway over which the travel passed and frightened the plaintiff's horse, whereby the plaintiff was injured. The

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case is distinguishable from the present one in this, that the leaving of the steam-roller in close proximity to the traveled part of the street was not essentially a part of the process of repairing; also that the position of the roller constituted a defect in the highway. Nevertheless it was claimed that the injury was the result of the negligence of the agents and employees of the city in the use and care of the roller. The negligence was certainly very closely related to negligence in the mode of doing the work. The court says—"The rule of law that governs in cases of negligence is simple and easily understood. * * Did the defendants exercise reasonable care to avoid the injury to the plaintiff? Reasonable care is the criterion by which to determine whether or not a party has been guilty of culpable negligence. Every person is bound to exercise that degree of care to avoid injury to others in all that he does."

In *Judge v. City of Meriden*, 38 Conn., 90, the street commissioner in an emergency and when there was a large quantity of surface water to be disposed of, opened a cross-walk and thereby turned the course of the water so as to overflow the premises of the plaintiff. The court held that if it was to be regarded as a wanton and malicious act, committed for the purpose of injuring the plaintiff, it was not the act of the defendants, and they were not liable. If on the other hand he acted on his best judgment, even if his action was hasty or negligent, his relations to the defendants were not such as to make them liable for his acts. BUTLER, C. J., while not dissenting from the legal principles laid down, said: "But I am inclined upon reflection to think otherwise, and to hold that, if the court found that the defect in Main Street which the commissioner attempted to remove, was occasioned by the wrongful elevation of Main Street, without a suitable provision for the passage of water so as to protect it from excessive overflows from Veteran Street, the corporation was directly responsible for the defect occasioned by such overflow, and the court was right in holding them liable for the consequences which naturally and necessarily resulted from the removal."

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It seems that that learned jurist had no doubt that towns were liable for the consequences of an improper construction of a highway. We discover nothing in the opinion of the court which is inconsistent with that view. The Chief Justice and the other members of the court differed only in the construction of the record.

But the case of *The Danbury & Norwalk Railroad Co. v. Town of Norwalk*, 37 Conn., 109, is more directly in point. The only difference between that case and this is, that that was a petition in chancery to restrain the town from committing the wrong, and this is an action at law to recover damages for the wrong committed. The principle applicable to the two cases is the same. The injunction was granted only because the contemplated action of the town was an invasion of the legal rights of the railroad company. If that was so in that case it is in this; and if the defendants have invaded the legal rights of the plaintiffs they are responsible. The conclusion is inevitable.

The reasoning of the court assumes that a town would be liable in a case like this. In speaking of the power and duty of towns in respect to highways, the court say (p. 119):—"The authority is clear and the duty imperative; always subject however to the salutary qualification, interposed for the protection of others, that this authority shall be so exercised, and this duty discharged in such a manner, as to occasion no wanton injury to the property or rights of other persons, natural or artificial."

This is sound law and is abundantly sustained by the authorities cited.

It seems to us impossible to hold that this town is exempt without overruling that case. We regard the principle there enunciated as sound and in harmony with decided cases elsewhere.

We advise the Superior Court to overrule the demurrer.

In this opinion PARDEE and LOOMIS, Js., concurred; PARK, C. J., and GRANGER, J., dissented.

SUSAN WARD vs. JOHN H. DONOVAN.

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A motion for a new trial is the only mode of bringing up for review in the Supreme Court any errors in the charge of the court, or in rulings as to evidence, in the Superior Court and Court of Common Pleas.

BASTARDY process, brought before this court by a motion in error from a judgment for the plaintiff in the Court of Common Pleas. The decision of this court will be understood from the opinion, without a statement of the facts.

H. B. Munson, for the plaintiff in error.

W. B. Wooster and *D. Torrance*, for the defendant in error.

LOOMIS, J. The defendant in this case attempts to bring before this court for review, by motion in error, founded on a bill of exceptions, a supposed mistake of the Court of Common Pleas, in receiving and rejecting certain matters of evidence offered during the trial.

In so doing we think he has mistaken his remedy; that he should have brought his case here by motion for a new trial. To adopt the language of ELLSWORTH, J., in giving the opinion of the court in *Tolland v. Willington*, 26 Conn., 581: "A writ of error or motion in error will bring up properly a revision of the declaration, pleadings and judgment, but not an error in receiving or rejecting evidence, or in the charge of the court. We notice it that a salutary rule of law may be preserved and followed."

Prior to the year 1807 the mode of revising the decisions of the inferior courts was by filing a bill of exceptions and bringing a writ of error thereon. But as a writ of error was *stricti juris* and often reversed a judgment for the most trivial error, the judges in that year adopted a new rule, declaring that bills of exceptions should not thereafter be admitted, but that motions for new trials should in all cases be substituted for them. 3 Day, 29. And from that time to the present bills of exceptions have been put under the ban of

disfavor, and motions for new trial have been favored by this court. Afterwards, when the Supreme Court of Errors, pursuant to the statute approved June 5th, 1847, revised the rules of practice, the same rule was continued in force in the following language:—"No bills of exceptions will be allowed in the Superior Court, except in cases where an adequate remedy is not afforded by motion for a new trial." Rules of Practice, chap 4, sec. 1; 18 Conn., 564. This rule was in terms applicable to the Superior Court, for the obvious reason that motions for new trial were allowed only in the Superior Court; the remedy in the county courts being then only by appeal or writ of error to the Superior Court. But upon the establishment of our present courts of common pleas they were, by the express terms of the following statute, put on precisely the same ground as the Superior Court, relative to motions for new trial:—"Upon the trial of all matters of fact in the Superior Court, Court of Common Pleas, or District Court, whether to the court or jury, if either party shall think himself aggrieved by the decision of the court upon any question of law arising in such trial, and shall at the same term, and within forty-eight hours after verdict rendered, or issue found, except as hereinafter provided, make a motion for a new trial, stating therein the question or questions of law so decided, the court shall grant a rule to show cause, and reserve said motion and rule for the advice of the Supreme Court of Errors next to be holden in the judicial district or county; but the party filing said motion, or his attorney, shall make oath, if required by the adverse party, that the same is not intended for delay; and execution may be stayed at the discretion of the court." General Statutes, p. 448, sec. 5.

In thus prescribing the same remedy for erroneous decisions in the courts of common pleas as in the Superior Court, to be taken in both cases directly to the Supreme Court of Errors, and in thus making important rights of the adverse party to depend on the form of remedy prescribed, the long established and well known rules of practice governing such motions were virtually adopted by implication. But in order to remove all possible doubt on this subject we find in the

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General Statutes, p. 38, sec. 5, in chapter 2d, entitled "Courts of Common Pleas and District Courts," the following provision:—"The course and rules of practice in each of said courts, subject to any necessary modification by rules adopted therein, shall be conformed as nearly as practicable to those of the Superior Court." The courts of common pleas may therefore now be regarded as not only within the reason and spirit of the rule, but within the letter also; and the rule itself is so salutary and important as to make the dismissal of the present cause a just and appropriate penalty for its non-observance; and we may add in conclusion that there is nothing disclosed of record respecting the merits of this particular case that makes us regret the necessity that compels the enforcement of the rule by erasing the case from the docket.

In this opinion the other judges concurred.

JOHN HARROP vs. THE LANDERS, FRARY & CLARK COMPANY.

W went into the employment of the defendants under an arrangement by which he was to commence working for them, and to work whenever they had work for him, of which they were to give him notice, but nothing was agreed as to the length of time that he should continue in their employment. Before commencing work he assigned to *A*, by an order on the defendants, all money to become due to him while in their employ. This order was accepted by the defendants and put on record as required by the statute. Afterwards, and while *W* was in the defendants' employment, they were factorized as his debtors by one of his creditors. Held that the wages earned up to the time of the attachment could be held by *A* under the assignment.

SCIRE FACIAS upon a foreign attachment; brought to the Court of Common Pleas, by appeal from a justice of the peace, and tried to the court before *De Forest, J.* The following facts were found by the court:

In February, 1877, George Whitely, the defendant in the factorizing suit, had gone into the employment of the

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defendants, a manufacturing company doing business at New Britain. He had no personal interview with them in regard to his employment, but his brother, Henry Whitely, had previously been sent for by the defendants, and asked by them if George had employment, and upon being informed that he had not, they told him that they would give him work along as they had it, that the work would not be steady, and would be paid for by the piece, and that some of the work was ready then. Henry communicated these facts to George, who thereupon began work, and has continued ever since in the employ of the company when they had work for him, and was in their employ at the time of the bringing of the factorizing suit, they notifying him from time to time when work was ready for him. There was no contract, either express or implied, between the defendants and George Whitely for his continuing in their employment for any definite time.

At the time of the service of the factorizing suit upon the defendants there was in their hands the sum of \$20.30 which had been earned by George Whitely by work done by him for them.

Before commencing work George Whitely made the following assignment of his earnings to his brother, Henry Whitely:

"New Britain, Conn., Feb. 10th, 1877. To Landers, Frary & Clark: Please pay all money due me and to become due me while in your employ to Henry Whitely. Yours, truly,
GEORGE WHITELEY."

This order was accepted by the defendants, and recorded in the office of the town clerk in accordance with the statute.

Upon these facts the court rendered judgment for the plaintiff, and the defendants brought the record before this court by a motion in error.

A. B. Beers, for the plaintiffs in error.

J. C. Chamberlain, for the defendant in error.

PARK, C. J. This case cannot be distinguished in principle from that of *Augur v. The New York Belting & Packing Co.*, 39 Conn., 536. In that case the assignor was at work under

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no special contract with his employer at the time the assignment was made, nor under any agreement as to any particular length of time. He was at work under an implied agreement that his employment should continue as it had done previously, and upon the same terms.

Here there was an agreement between Whitely, the assignor, and the defendants, when the assignment was made, which was that he should then commence work for the defendants, and should continue to work for them as they should have work for him to do. The contract was made with Whitely through his brother, but that can make no difference, inasmuch as the brother acted as agent for both parties. Nor can it make any difference that Whitely was not to be constantly employed. He was told at the time that the work would not occupy all his time, but he should have what work there was to be done. No new contract was made after each suspension of work for the next working period, but all the work was done under the original contract. No claim is made that the assignment was not entered into in good faith by the parties, and we think therefore that it was valid.

There is manifest error in the judgment complained of.

In this opinion the other judges concurred.

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**CHARLES M. GILMAN AND WIFE vs. WILLIAM A. DISBROW
AND ANOTHER.**

A husband having a life estate in a house and land connected therewith of which his wife owned the fee, contracted with the petitioners, who were builders, to construct two small buildings and two hundred feet of fence on the land. They erected the buildings and fence, with the knowledge and consent of the wife, who with her husband lived in the house, but with no contract with or request from her, and the husband had no authority and did not assume to act as her agent in the matter. Held that the petitioners were entitled to a lien only upon the life estate of the husband.

WRIT OF ERROR from a judgment of the Court of Common Pleas of Fairfield County to this court, to reverse a decree of that court in favor of the defendants in error upon a petition brought by them against the plaintiffs in error; for the foreclosure of a builders' lien. The case is fully stated in the opinion.

C. Thompson, for the plaintiffs in error.

G. Stoddard, for the defendants in error.

PARDEE, J. The statute provides that "every building in the construction and repairs of which or any of its appurtenances any person shall have a claim for materials furnished or services rendered exceeding twenty-five dollars in amount, by virtue of an agreement with or by consent of the owner of the land upon which such building is erected, or some person having authority from or rightfully acting for such owner in procuring or furnishing such labor and materials, shall, with the land upon which the same may stand, be subject to the payment of such claim; and such claim shall be a lien, &c." Gen. Statutes, page 359, and Session Laws of 1875, page 9.

In 1875 Disbrow & Wheeler, defendants in this writ of error, erected upon a piece of land situated in the town of Southport two hen-houses of wood, one thirty by sixteen, the other ten by sixteen feet, each standing upon a stone foundation; also two hundred feet of fence. Mary B. Gilman, one of the plaintiffs in this writ, owned the fee of the land; her co-plaintiff, her husband, is entitled to the use and improvement thereof during his life; they lived together in the dwelling-house upon the land. The materials were furnished for, and the work was performed upon these structures upon an agreement made with the husband; the wife made no contract or request in reference to the matter; she knew that the defendants were furnishing the materials and doing the work, and by making no objection consented to its being done. Upon the completion of the structures they filed a certificate of lien upon the land for \$446. The debt not being paid,

they brought a petition for foreclosure to the Court of Common Pleas for Fairfield County at the February term, 1876, in which they alleged that the wife was indebted to them in the foregoing sum for materials furnished and labor performed at her request, and asked that she should be barred unless she paid the debt. The court, at the June term, 1876, granted the prayer of the petition, and decreed a foreclosure against her unless she should pay on or before the first Monday in April, 1877. She did not pay, and has brought this writ of error to the Supreme Court at the September term, 1877, assigning errors as follows: that the petition is insufficient in the law; that upon the facts found it should have been dismissed; that the facts are insufficient; that they do not support the allegations, nor the decree; and that the wife is neither liable to pay nor to be foreclosed.

There were two estates in the land—the life estate in present use, in the husband; the fee, in abeyance, in the wife. His estate he could convey or mortgage, and it could be taken on execution under certain circumstances; he had the right to increase the profit from its use by erecting these structures. Within the meaning of this act he is the owner of his particular estate; the wife is the owner of the fee; and the lien is to attach only to that estate of which the person making the contract is the owner. The wife's fee is not to be subjected to this statutory mortgage unless she made an agreement with, or requested the defendants to furnish the materials and perform the labor. The fact that she saw them doing it, and by making no objection assented to its being done, does not impose an implied promise upon her. There is nothing in the finding tending to show either that the structures were erected for the improvement of her reversion or that they were calculated to have that effect; indeed, their character and their purpose, that of breeding fancy poultry, alike suggest present and temporary rather than future and permanent use; suggest advantage only to the present estate in the husband. In view of this she may well have supposed, in the absence of any express promise or request from herself, that the defendants had made such arrangements with him as to

Williams v. Stratton.

payment, as to induce them to forego any lien upon her fee and rely solely upon his personal credit or upon the security of his life estate. As a pre-requisite to the lien she should herself either have made the contract or have consented to the performance of the work after information from them that it was not to be done upon the personal credit of the husband, nor upon the credit of his life estate, but upon the credit of her fee, and that this last would be subjected to a lien in default of payment. And, as we may assume that these structures would add to the profit of the life use, it is to be presumed that the husband was acting solely for himself and for the benefit of his particular estate, until it is made to appear that he was acting in fact as the agent of the wife.

Inasmuch as the contract was with the husband solely, the decree complained of is erroneous in that it runs against the wife and her estate.

The judgment must be reversed and the decree annulled.

In this opinion the other judges concurred.

EDMUND M. WILLIAMS vs. SETH L. STRATTON AND OTHERS.

The statute (Gen. Statutes, tit. 19, ch. 8, secs. 17, 18,) provides that in all actions of trespass, other than of assault and battery and for the taking of property exempt from being taken on execution, in which judgment shall be rendered for the plaintiff, the defendant may, upon petition to the same court, be allowed to set off against such judgment any debt that he may hold against the plaintiff. Held that the object of the exception in the statute was to protect from such a set-off any suit brought to recover damages for attaching exempt property, and that it therefore applied to an action of trover brought for such a purpose as well as to one of trespass.

TROVER to recover the value of property attached by the defendants, which the plaintiff claimed to be exempt from execution; brought, by appeal from a justice, to the Court of Common Pleas of Fairfield County. After a verdict for the plaintiff the defendants filed a petition, under Gen. Statutes,

p. 426, secs. 17, 18, to be allowed to set off against the judgment a judgment which they held against the plaintiff. The court (*De Forest, J.*,) denied the petition, and the defendants brought the record before this court by a motion in error. The case is fully stated in the opinion.

J. C. Chamberlain, for the plaintiffs in error.

S. S. Blake, for the defendant in error.

CARPENTER, J. The defendants attached certain property of the plaintiff which was exempt from attachment, obtained judgment in their suit, and sold the property attached on the execution. This suit, which is an action of trover, is brought to recover the value of the property so attached and sold. The plaintiff obtained a verdict, and thereupon the defendants presented to the court, under the provisions of the statute (Gen. Statutes, p. 426, secs. 17, 18,) a petition asking that they might be allowed to set off against that judgment the amount of a judgment in their favor against the plaintiff. The petition was denied, and the defendants bring the case before this court by a motion in error.

The statute, under which the defendants claim a right to a set-off, was first passed in 1852, and provides "that in all actions of trespass other than those of assault and battery, and in all actions of trespass on the case, in which judgment shall be rendered in favor of the plaintiff, it shall be lawful for the defendant or defendants in such action to set off against such judgment any debt or debts which he or they may hold, either jointly or severally, against the plaintiff, &c." The broad language of this statute would seem to allow a set-off in cases brought to recover the value of property exempt from attachment which had been wrongfully attached. Consequently in 1853 an act was passed providing that it should not "apply to cases where actions are brought for damages for the taking of property which by law is exempt from being taken on execution." These two statutes were incorporated in the revision of 1866 as follows:—"In all actions of trespass, other than actions of assault and

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battery, and other than such as are brought for damages for the taking of property which is by law exempt from being taken on execution, and in all actions of trespass on the case, in which judgment shall be rendered in favor of the plaintiff, the defendant or defendants in such action may set off against such judgment any debt or debts which he or they may hold, either jointly or severally, against the plaintiff, &c." In the revision of 1875 it is substantially in the same language. The claim now is that a set-off will be allowed in all cases except in actions of trespass, and that the plaintiff has lost the benefit of the exemption by bringing an action of trover.

It is very clear that this set-off could not be allowed under the law as it stood prior to the revision of 1866. We also think that the change of language, appearing in the subsequent revision, was not intended to change the meaning. Evidently the legislature intended that the statute exempting property from attachment should remain in full force. The exception in the statute as it now stands has a broader significance than the language would seem to imply. To limit it to actions of trespass, as the defendants claim it should be, will in effect impute to the legislature an intention to protect exempt property, provided the party brings an action of trespass, otherwise if he brings an action of trover. Such a construction is little less than absurd. We think it applies to all actions brought to recover damages for the taking of property which is exempt from being taken on execution.

There is no error in the judgment of the court below.

In this opinion the other judges concurred.

Curtis v. Alvord.

CARLOS B. CURTIS *vs.* CHARLES A. ALVORD.

R and *A* entered into an agreement by which *R* was to apply for and use all practicable means to obtain a patent for an invention which he had made, the letters patent to be issued in their joint names; in consideration of which *A* was to pay him \$125 on the execution of the agreement and \$175 at the time of the issuing of the patent. *A* paid the \$125 when the agreement was signed, and *R* at once applied for the patent; but before it was issued a creditor of *R* factorized *A* as his debtor. Held that there was at the time no indebtedness of *A* to *R*.

A garnishee stands no worse in a factorizing suit than if he had been sued by his creditor.

SCIRE FACIAS upon a process of foreign attachment; brought by appeal from a justice of the peace to the Court of Common Pleas in Fairfield County, and tried to the jury on the general issue before *De Forest, J.*

The defendant and one Joseph A. Rand entered into the following agreement on the first day of February, 1876.

"This agreement between Joseph A. Rand, party of the first part, and Charles E. Alvord, party of the second part, witnesseth—That whereas said party of the first part has invented a music machine or holder, which is new and useful, and has filed a caveat for the same in the patent office at Washington, and is about to make application for letters patent for the same: now, in consideration of the matters hereinafter mentioned, the said party of the first part has covenanted and agreed, and does hereby covenant and agree, to and with said party of the second part, to make immediate application for said letters patent to said patent office, and to use all practicable means to secure the issue of such letters patent, and before the issuing thereof to assign and transfer in writing in due form of law the undivided one-half of said invention and letters patent to said party of the second part, and cause said letters to be issued to said parties jointly and equally. In consideration of which the said party of the second part is to pay said party of the first part the sum of \$125 at the time of the execution hereof, and the further sum of \$175 at the time of the issue of said letters patent to said

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parties; and said party of the first part hereby acknowledges the receipt of said first mentioned sum of \$125.

JOSEPH R. RAND, [SEAL.]

CHARLES E. ALVORD, [SEAL.]”

It was admitted that Alvord paid Rand the \$125 at the signing of the agreement, and that Rand had applied for and was seeking to obtain the patent, but that the letters patent had not been issued on the 19th of February, 1876, at which time Alvord was factorized by the plaintiff in the process of foreign attachment against Rand upon which the present suit of *scire facias* was brought. The \$175 to be paid at the time of the issuing of the letters patent had not been paid, and the court charged the jury that it did not constitute a debt until the contract had been performed on the part of Rand by the issuing of the letters patent.

The jury having returned a verdict for the defendant, the plaintiff moved for a new trial for error in the charge of the court.

J. C. Chamberlin, in support of the motion, contended that the covenants in the agreement were independent, and that it was not necessary therefore to show full performance on the part of Rand; that if they were dependent, yet as the defendant had received a part of the consideration, there could be a recovery against him, with a recoupment of whatever amount would compensate him for the failure of full performance; that the failure of full performance did not defeat the purpose of the contract; that the provision as to the \$175 being paid “at the time of the issue of the letters patent” merely fixed the time of payment, and that the defendant could be held as garnishee if the debt existed, even though the time of payment was uncertain and future, and the amount to be paid was not yet ascertained.

W. C. Wildman, contra.

PARDEE, J. This is a *scire facias* brought upon a judgment in foreign attachment, in which Alvord was factorized by Curtis as the debtor of Joseph A. Rand; the defendant had

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a judgment for costs in the Court of Common Pleas for Fairfield County; and the plaintiff moves for a new trial.

The question is, was Alvord indebted to Rand on the 19th of February, 1876.

Rand having invented a music holder, agreed, on February 1st, 1876, that he would apply for letters patent thereon and cause them to be issued to himself and Alvord jointly; Alvord paid him \$125, and agreed to pay \$175 in addition upon the issue of the patent; this had not issued on the 19th of February, 1876, the day of the service of the trustee process.

The rule is that the trustee is not to be placed in a position worse than that which he would occupy if the principal had sued him for the debt.

The plaintiff insists that the covenants in this agreement go to a part of the consideration only, on both sides, and were independent; and that it would not have been necessary for Rand to have proven that the patent had issued to have enabled him to recover; also that if the covenants are dependent, a failure to procure the patent is not such a breach as to bar him from a recovery unless such failure defeats the purposes of the contract; and that the trustee is liable even if the patent had not issued at the time of the service. In *Leonard v. Dyer*, 26 Conn., 172, this court adopts the rule stated by Tindal, C. J., in *Stavers v. Curling*, 3 Bing. N. C., 355, that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms must give way.

In the case before us it is quite plain that the whole value of Alvord's purchase was in the monopoly to be secured by the patent; the mutual covenant concerning this went to the whole consideration; the failure to procure this would entirely defeat his purpose; indeed, the intention of both parties to make the issue a condition precedent to the payment of the \$175 finds full and exact expression in the language of the

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contract; by its terms Alvord owed no debt or duty to Rand on February 19th, 1876.

The plaintiff further urges, that where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant without averring performance. But there is no place here for the application of any such rule; the contract is incapable of division; Rand promised to do but one thing, namely, procure the patent; this promise unfulfilled, he had done nothing to entitle himself even to a partial payment; he had not by meritorious service created an indebtedness on the part of Alvord to himself from which a balance would be his due after deducting the damages resulting from his own breach of contract. In truth, he had performed no service, delivered no property, and consequently had no claim, legal or equitable.

We do not advise a new trial.

In this opinion the other judges concurred.

**ALICE K. GRAIN AND ANOTHER vs. WILLIAM D. SHIPMAN,
ASSIGNEE.**

Certain real estate was conveyed by a vendor to a married woman for her sole use, for the sum of \$24,000, of which she paid \$9,000, and with her husband gave a note for \$15,000, secured by a mortgage back of the land. The husband afterwards paid the note from his own funds, and had the mortgage discharged. Afterwards the wife, who had expended \$1,000 in improvements on the property, executed an absolute deed of it to her husband, who gave her his bond for \$10,000 and a mortgage of the property to secure it, the object of this arrangement being to secure to the wife the \$10,000 which she had advanced, and which they both regarded as the amount of her interest in the property; but neither the deed nor mortgage was put on record until two years afterwards. Shortly before they were recorded the husband made an assignment of all his property for the benefit of his creditors, and in the schedule attached to the assignment included this property, as of the value of

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\$25,000, less the mortgage of \$10,000 upon it. The assignee having taken possession, the husband and wife brought a petition in equity against him, alleging that the deed from the wife to the husband was of no validity, and that the assignment conveyed nothing to the assignee, but that it created a cloud upon her title, and praying that the title be confirmed in her. Held—

1. That it was clear upon the facts that the taking of the conveyance in the first instance to the wife was not intended by him or understood by her to be a gift of the property to her.
2. That the title must be regarded as placed in her name as a security for the re-payment of her advancement upon it, and in trust to convey the property, subject to that lien, to him or to such person as he should appoint.
3. That the deed of the wife to the husband, taken in connection with the giving of his note to her for the \$10,000 and a mortgage back to secure it, if effective for no other purpose, was in the nature of a formal written declaration of that trust.
4. That the husband's subsequent conveyance to the assignee was equivalent to notice to her of an appointment by him of the person to whom he wished her to convey, and to a request that she should convey to the appointee, subject to her lien.
5. That the wife was therefore not entitled to the decree prayed for, but that the assignee was entitled to the property subject to her lien of \$10,000 and interest, and to the payment to her of certain sums which it was found that she had since expended upon the property, and which she was equitably entitled to have re-paid.
6. That the court below should order a sale of the property by the assignee, and an equitable division of the proceeds with the wife upon the above principles.

BILL IN EQUITY, to set aside certain conveyances of real estate, to remove a cloud from the title, and to confirm the title of the petitioner to the property, or for a sale of the same and the payment to the petitioner of what should be found to be her share of the proceeds of the sale; brought to the Superior Court in Fairfield County. The respondent filed an answer, and the following facts were found upon the bill and answer.

On the 30th of October, 1869, C. W. Ballard conveyed by deed with covenants of warranty and seizin to Alice K. Grain, the petitioner, for her sole and separate use, the real estate in question, lying in the town of Darien, in this state. The deed was recorded on the same day.

The purchase price of the property was \$24,000, of which the sum of \$9,000 was paid by the said Alice in money belonging to her, independently of and in no way received

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from her husband, Francis H. Grain. The balance of the price was paid by the joint promissory note of the said Francis and Alice, payable to the grantor with interest, \$10,000 in five years, and \$5,000 in three years from its date. The note was secured by a mortgage of the same property to Ballard, of the same date, which was duly executed by said Francis and Alice, and recorded on the land records of Darien.

After the purchase, and before August 5th, 1873, Mrs. Grain expended the sum of \$2,200 in money belonging to her, and in no way received from her husband, in the erection of outbuildings and in other improvements on the premises, of which sum her husband before August 5th, 1873, re-paid the sum of \$1,200.

The \$15,000 note was paid by Mr. Grain before it became due, from his own funds. Satisfaction pieces, according to the forms in use in the state of New York, were executed by Ballard to the said Francis and Alice after the payment, and recorded May 18th, 1872.

On the 5th of August, 1873, Mrs. Grain executed and delivered to her husband a warranty deed of the property. The consideration expressed in the deed was \$35,000, but no money or other consideration, except as hereinafter stated, was in fact paid. On the same day, and as a part of the same transaction, Mr. Grain executed and delivered to Mrs. Grain a bond for the payment to her of the sum of \$10,000, payable on the fifth day of August, 1878, with interest at six per cent. per annum, half yearly from its date; which bond was secured by a mortgage deed of the property back to Mrs. Grain by her husband. This bond has never been paid, but is still due. The object of the parties in making this arrangement, and passing these deeds, was to secure to Mrs. Grain the sum of \$10,000 in the property; it being understood and agreed between them, and the fact being so, that this sum justly and equitably represented her interest in the property and the amount of her estate which had been expended in the purchase and improvement of it at that time, and that if Mr. Grain should desire to sell the property during her contemplated absence in Europe, her interest therein would be secure.

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The last mentioned deed and mortgage were not recorded until August 18th, 1875.

On the 27th of July, 1875, the persons composing the copartnership of Duncan, Sherman & Company, doing business in the city of New York, of which copartnership Mr. Grain was, and since the 10th day of April, 1870, had been a member, made an assignment of all their individual and copartnership property, for the benefit of their creditors, to the respondent, William D. Shipman, which assignment was duly recorded in the land records of Darien on the 6th day of August, 1875.

In the schedule of the property assigned by Mr. Grain, and by him included therein, was the real estate in question, which was inventoried in the following form:

"Dwelling-house, with out-buildings and about thirty-five acres of land, situated in Darien, Connecticut, estimated lowest market price, \$25,000; less mortgage thereon, \$10,000, = \$15,000. The dower right of Mrs. Grain will be released to the assignee." This schedule was attested by the oath of Mr. Grain.

On the 15th of November, 1875, the parties thereto having been advised by counsel that the satisfaction pieces before mentioned were not sufficient in Connecticut to release the mortgage from Mr. and Mrs. Grain to Ballard, Ballard executed and delivered a quit-claim deed of the premises to Mrs. Grain, which was duly recorded on the day of its execution.

After the assignment of Duncan, Sherman & Co. the respondent, as assignee, took possession of the property in question with the assent of the petitioners, it being understood by the respondent, and no objection being made by the petitioners, that the legal title thereto at the time of the assignment was in Mr. Grain, subject to a mortgage of \$10,000 to his wife.

Since the assignment the petitioners, without objection on the part of the respondent, have continued to live on the premises, but have, up to this time, paid him no rent therefor; and the respondent, as assignee, has since the assignment paid in taxes, insurance and repairs on account of the

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property, the sum of \$1,197.28, for which it is agreed by the petitioners he is entitled in any event to be reimbursed from the property. Between October 30th, 1869, and July 27th, 1875, Mrs. Grain has paid of her own money, for trees and shrubbery planted upon the premises, the sum of \$500. A fair annual rental for the place is \$500.

From October 30th, 1869, to May 1st, 1872, Mr. Grain was solvent and able to pay all his debts, and believed himself to be in like condition of solvency until on or about the 1st day of July, 1875..

The firm of Duncan, Sherman & Co., and the individual members thereof, are, and were at the date of the assignment, largely insolvent, and their indebtedness is and will be largely in excess of their assets.

Since the assignment Mrs. Grain has paid for permanent improvements on the property the sum of \$633.73.

At the time of the execution of the deed of August 5th, 1873, and of the mortgage of the same date, Mrs. Grain was intending to leave, and did shortly thereafter leave, for Europe, for an absence of several months. The deeds were executed at the request of Mr. Grain for the purposes aforesaid.

The assignment and the schedule annexed to it were made by Mr. Grain, without the knowledge or assent of Mrs. Grain, and without advice of counsel; being made by him with the intent to place all his property of whatever kind at the disposal of his creditors. He was, at the date of the assignment, possessed of no other property than his interest in the firm of Duncan, Sherman & Co., and such interest as he may have had in the property mentioned in the schedule.

Upon these facts the case was reserved for the advice of this court.

C. G. Child, for the petitioners.

1. It is obvious that if the deed of August 5th, 1873, passed title to Mr. Grain, so as to vest the same in him absolutely, his deed to the respondent would pass title to the extent of his interest. The first question therefore is, what

passed by that deed. At the time the deed was made, the statute in reference to conveyances by married women was in force, and had been for many years, substantially as it is now. Gen. Statutes, p. 353, sec. 10. By the common law the wife of course could not convey to her husband, and the statute did not enlarge her powers in that respect. *Bryan v. Bradley*, 16 Conn., 482; *Hinman v. Parkis*, 33 id., 188, 198; *Donovan's Appeal from Probate*, 41 id., 551, 557; 1 Swift Dig., 38. We claim therefore that the conveyance in question is void at law, because the contract was not capable of being made, and that it is void under any circumstances, because the statute, recognizing the common law rule, provides the only way in which the wife's real estate can be conveyed by deed. It might be also suggested that the universal acquiescence in the mode of conveying a wife's real estate, to wit, through a deed to a third person, is entitled to much weight. And see as to similar statutes, and the effect given to them, *Miller v. Hine*, 13 Ohio S. R., 565, and *Dunham v. Wright*, 53 Penn. S. R., 167. Both these cases hold a deed by a wife alone to be void. And we submit further, that if this deed is absolutely void on account of failure of parties required by statute to join therein, neither equity nor law can heal the omission. *Winton v. Barnum*, 19 Conn., 175.

2. The rights of Mrs. Grain are not affected by the fact that the conveyance to the respondent was for the benefit of creditors. There is no lien of any kind existing in favor of creditors, in law or equity, which originated in a benefit conferred upon the property. Every creditor gave his credit to a very different purpose, and is in no way prejudiced by the transaction between Mr. and Mrs. Grain. This distinguishes the case in question in a radical degree from such cases as *Donovan's Appeal from Probate*, cited above. The respondent, however, claims in his answer that credit was given to the firm and to Mr. Grain by the creditors whom the respondent represents as assignee, on the faith of Mr. Grain's being upon the records of the town the owner of the property. The claim is unsound, because at the date of the assignment and until twelve days after its record, the only deed by which Mr.

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Grain could claim title was unrecorded. It had remained so for more than two years, and an examination of the records of Darien by any creditor, before Duncan, Sherman & Co.'s failure, would have shown title in Mrs. Grain as her sole and separate estate. This property in no way at any time furnished any basis of credit, or reason to trust any of the parties whom the respondent represents, but, on the contrary, so stood on the records that every creditor had notice that it did not furnish any basis of credit or trust. It seems to us therefore that the question is this: Should a deed void at law, given by a wife to a husband who was solvent for nearly two years after its date, placed on record subsequent to insolvency, and subsequent to a deed of assignment, be adjudged void as against the wife, in favor of creditors ignorant of and who never trusted to such estate, for the mere reason that it was placed in the husband's schedule, without the wife's knowledge, and without the advice of counsel, and so far in ignorance of legal obligations that the wife's dower, (which if there was anything to assign could not exist,) was pledged as an incident to the transfer? We do not think the court will so hold, and claim that the law is to-day as in 1869, to wit: "that full and complete protection to married women in their rights of property against creditors of the husband, is now the established policy and settled law of this state." *Jackson v. Hubbard*, 36 Conn., 15.

3. It is not disputed that a married woman may, by a contract in her own name, bind her separate real estate, and that such contract may be enforced in equity. This would seem to follow from the decision in *Donovan's Appeal from Probate*, 41 Conn., 551. But in order to found a claim for equitable interference it is necessary first to show "that the contract must be for the benefit of the married woman or of her estate." *Ib.*; *Williams v. King*, 43 Conn., 569. The reasoning in these cases pre-supposes the benefit as a condition precedent to the liability. It places the foundation for the rule on the right recognized in the statute of 1869, on the part of a married woman, to bind her estate by contracts made for her benefit. In recognition of the same principle

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are the cases of *Wells v. Thorman*, 37 Conn., 318, and *Buckingham v. Moss*, 40 id., 461. But we know of no rule of law or equity which validates an agreement between husband and wife, or a deed from one to the other, when the wife is without any benefit by the transaction. Equity will not enforce such a conveyance. *Shepard v. Shepard*, 7 Johns. Ch., 57; *White v. Wager*, 25 N. York, 328; *Winans v. Peebles*, 32 id., 423; *Hinman v. Parkis*, 33 Conn., 198; *Beard v. Beard*, 3 Atk., 72; 2 Story Eq. Jur., § 1391.

4. We have considered the case hitherto as determined by the application of equitable principles in favor of the respondent. It must be borne in mind, however, that the respondent is here simply claiming his legal rights in behalf of Duncan, Sherman & Co's creditors. If, as we have endeavored to show, they have no rights, he has no claim and no standing ground for equitable consideration. Certainly no sound equity requires Mrs. Grain to give up her home gratuitously for Duncan, Sherman & Co's creditors, who never knew Mr. Grain's title, or relied upon a credit attaching thereto, or in any way directly or indirectly contributed to the money used in the purchase of the property. But, if the court sustains the deed to Mr. Grain, no reason exists why Mrs. Grain's lien of \$10,000 should not be allowed. It would be gross injustice to say that she is bound by her deed to her husband, but that he is not bound by his mortgage to her.

E. W. Seymour and *M. W. Seymour*, for the respondent.

1. The property of Mrs. Grain is represented in the real estate in question to the amount of \$10,000 and no more. It was not intended by her and her husband that it should be therein represented to any greater extent, as conclusively appears from the fact that of the \$2,200 she had paid on account of improvements thereon, he, before the deed and mortgage thereon were executed, re-paid her \$1,200, and it was agreed between them, and it is found to be the fact, that this sum justly and equitably represented her interest in the property. Now upon this state of facts, and independently of any express understanding in the matter, Mr. Grain, upon

well established principles, would be entitled in equity to such proportion of the land as the money he paid bears to the purchase price. An implied trust, in the nature of a resulting trust, is created by the transaction in his favor, which attaches to the land. Perry in his work on Trusts, speaking of such trusts, says they are sometimes called presumptive trusts, because the law presumes this to be intended by the parties from the nature and character of their transactions with each other, although their general foundation is the natural equity which arises when parties do certain things. Perry on Trusts, §§ 124, 125, 126, and notes. Irrespective then of any question whether the deeds between the parties were legal conveyances, our claims must be sustained. Equity will not interfere to prevent the just arrangement of the property between the parties from working out its equitable results.

2. But as between the husband and wife the deeds of August 5th will be upheld in equity, as conveyances, if necessary, to carry out the just and equitable division then made. There are no subsequent purchasers whose rights will thus be interfered with. The assignee and those he represents are interested that the arrangement as made should be recognized as valid, and there is nothing to prevent equity being done to all concerned by a decree carrying into effect the deliberate acts of the parties, such acts justly and equitably showing the real interests of the respective petitioners in the real estate. Besides, it will not be disputed that a husband and wife may now enter into contracts with each other which will be recognized as good and will be enforced in equity, in many instances and under many circumstances. Bishop's Law of Married Women, §§ 166, 714, 719, 721, 724, 789. In our own state the tendency of recent decisions is strongly in the same direction, and many of the profession believe that our courts would uphold, *in law*, a direct conveyance between husband and wife.

3. In the case at bar it is to be especially borne in mind that the interest of Mrs. Grain in the real estate was a sole and separate interest. Concerning such interests it has long

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ago been decided that, according to the principles of equity, a married woman's sole conveyance of property she holds as sole and separate estate, must be allowed to operate. The settled doctrine of the English law is, that where property is held by a *feme covert* to her separate use she has an unlimited power over it and may dispose of it to all intents and purposes as if she were a *feme sole*, unless restrained by some particular provision in the deed or settlement. This doctrine needs the citation of no authorities to commend it. It is examined and commented upon in the leading case of *Jaques v. Methodist Episcopal Church*, 17 Johns., 578, and from it, says Spencer, C. J., it necessarily follows that the wife, from the power she had over the property, might dispose of it in the same way as if she were sole. It will not be denied by the petitioners that contracts between husband and wife for the transfer of property are now repeatedly enforced. They must be fair, free from coercion, mistake, or fraud, and then they will be upheld in equity. Such is the doctrine clearly expressed or implied in several late decisions of our own court. *Hinman v. Parkis*, 83 Conn., 188; *Buckingham v. Moss*, 40 id., 461; *Langenback v. Schell*, id., 224; *Donovan's Appeal from Probate*, 41 id., 557. And we insist that this conveyance by a *feme covert* direct to her husband of her sole and separate estate will be enforced in equity when, "upon careful scrutiny," it appears that the transfer was one that in "justice and equity" she ought to have made and was free from suspicion of fraud or coercion. This point cannot be weakened by any suggestion that in order to be upheld the contract must be beneficial to the married woman or her estate. The elements for the application of that principle are mainly wanting. In the first place, if she had paid the entire purchase price of the property, or if the purchase price had not been paid at the date of her deed, or if it had been paid for her benefit, the suggestion might merit consideration. But it was not so. She gave the deed *because* it was not so, and to make the record title represent the real facts. But in the next place, it was a benefit to her and to her estate that her title by deed should correspond with her actual interest in

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the property, for neither a court of law nor of equity will sanction any other idea than that every title is benefited by a truthful disclosure of its actual condition. It is a good consideration for an act like this that it will disclose the truth. In the nature of things no other consideration was necessary. The husband was not called upon to pay the wife for property which he had already paid Ballard for, and she would have no right to insist that her apparent interest should continue to be greater than her real interest.

4. In conclusion, and aside from the foregoing considerations, suppose that equity would not imply a trust in favor of the husband who paid \$14,000 towards the purchase of the real estate. And suppose a direct deed between husband and wife, even of her separate estate, could not be upheld in equity, no matter how strong its claims to equitable support. And then suppose that the present respondent should bring a bill in equity stating the facts found by the record, and that only \$10,000 of the wife's property had been expended for, or was in any way represented in, the real estate; that the husband had paid \$14,000 of the purchase price, not to the wife, not through her to the grantor, not by way of gift or settlement in her favor, but directly, of his own funds, to the grantor; that in view of such payment by him and in recognition of his rights in the property, the husband and wife, for the purpose of adjusting the title so that it would truly represent their respective interests, executed the deeds of October 5th; that such deeds were insufficient, as instruments, to pass the title they purported to pass; and praying the court to make valid and confirm the titles in order to carry into effect the just and equitable attempt of the parties, and to confirm the title of the respondent as assignee to that portion of the property assigned to him by the husband. If such a bill were brought, would not the court, upon finding that the deed of the wife was fairly and understandingly made, one that in equity her husband was entitled to demand, confirm and make valid such arrangement, so as to carry out the equitable undertakings of the parties, and so that the petitioner, in such case, might hold, for the benefit of the husband's cred-

itors, the property which actually belonged to him, and which ought to help pay his debts? In the case supposed, if the court would so confirm the transfer, then there is an end of this case. The court will not, upon the petitioner's prayer, in effect set aside the deed of the wife, if, upon a bill brought by the respondent, it would confirm it.

PARDEE, J. It is quite unnecessary to determine to what extent a court of equity would go in the absence of direct proof, in inferring an intention on the part of a husband to make a gift to his wife. The statement of facts makes it certain that in the case before us the husband did not intend to make, and the wife did not suppose she had received, a gift. The husband placed the title to the property in the wife's name to secure the re-payment of her advancements upon it, and in trust for himself for the remainder; in trust upon his request to convey it to himself or to such person as he should appoint, subject to her incumbrance. The deed of August 5th, 1873, from herself to him, if effective for no other purpose, is in the nature of a formal written declaration and acknowledgment of that trust, and was an effort to carry it into execution. This act of the wife, taken together with the complementary act of the husband in giving to her his bond of even date, is most convincing as a piece of evidence; in these they have joined in excluding themselves from the possibility of establishing their present claim, that the transaction was the giving of the whole estate to the wife; and, properly, the finding bars the door against it. While she thus held this estate for him and subject to his order, he conveyed it to the assignee; this was equivalent to notice to her of an appointment by him and a request that she should convey to the appointee, subject to her lien, and confirm his grant; and this, theoretically, it is her duty to do; but practically we are to reach the result by another process. The estate must be converted into money, and this must be divided between herself and the assignee according to their respective equitable rights. Therefore we must advise the court to deny her prayer for a decree confirming a clear title to the whole estate in herself as against him.

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We might content ourselves with this conclusion and dismiss the petition, but the court has the estate within its power, all parties in interest are before it, and the equities are known; therefore it is our duty to make final disposition of the case, precisely as if the assignee had filed a cross-bill for the confirmation of his rights.

We advise the Superior Court to decree the sale by the assignee of the property described in the petition; that from the proceeds he shall first re-pay to the assignee the sum of seven hundred and eighty-two dollars and sixty-three cents with interest, being money expended by him for taxes, repairs, &c.; this by the agreement of the parties hereto; secondly, that he shall pay to Alice K. Grain, the petitioner, the two sums, namely, ten thousand dollars, and eleven hundred and thirty-three dollars and seventy-three cents, each with interest, deducting therefrom such sum as shall be fixed by the court as rent for the property from the date of the assignment by Francis H. Grain to the date of the sale; and that the respondent, in his capacity as assignee, is entitled to the remainder.

In this opinion the other judges concurred.

[The cases of the Fairfield County term will be continued in the next volume.]

SUPPLEMENT.

THE CONTRACTORS TO REBUILD AND SUPPORT UNION WHARF AND PIER IN NEW HAVEN vs. THE STEAMER J. H. STARIN.

The libellants were the owners of an ancient pier extending several hundred feet into New Haven harbor, which had been constructed and maintained under sundry resolves of the legislature, which authorized the collection of certain wharfage upon goods discharged upon or shipped from it, and made such wharfage a lien upon the vessels. The proprietors of the undivided lands of the town had granted the land necessary for the pier, and as an inducement to the undertaking had voted that no other wharf should be established upon the east side of it within three rods. Afterwards the libellants agreed with a canal company that the latter might run an embankment and wharf from a point on the east side of their pier to the mainland, enclosing a large basin for the boats of the canal, which, with the goods transported by them, were to be exempt from wharfage for that part of the pier taken into the basin, the libellants retaining every other right before possessed. The canal was afterwards abandoned and the basin filled up, the rights of the canal company as to the basin and pier becoming vested, with the libellants' consent, in a railroad company; the libellants neither then nor afterwards relinquishing, either expressly or by non-user, any further rights of wharfage. Afterwards, another railroad company acquired from the company before mentioned the right to construct, and constructed, a pier extending into the harbor from the basin wharf, parallel with and about four hundred feet from the libellants' pier. At this pier a coasting vessel discharged and received goods, which were transported to and from the mainland over the basin wharf and that part of the libellants' pier which had adjoined the canal basin and which was now a part of the mainland. Held, in a libel of the vessel for wharfage upon the goods—

1. That while that part of the pier had become a public highway for all other purposes, it was still a part of the libellants' pier as to all freight transported over it to and from vessels.
2. That the protection of the libellants by the vote of the proprietors of undivided lands, from any other wharf within three rods, did not operate to limit their rights to the case of freight discharged from or delivered to vessels within that distance.
3. That the goods in question were therefore liable to pay wharfage.
4. That as the law gave a lien upon the vessel for the wharfage, it was a proper case for the libel of the vessel in a court of admiralty.

The construction given by the Supreme Court of Connecticut in *Union Wharf Co. v. Hemingway*, 12 Conn., 293, to the resolves of the legislature of Connecticut under which the libellants claim, must be accepted as the proper construction of those resolves.

LIBEL of a vessel; in the United States Circuit Court for the District of Connecticut, September term, 1878. The case is fully stated in the opinion.

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S. E. Baldwin, for the libellant.

G. H. Watrous, *W. B. Wooster*, and *M. F. Tyler*, for the defendants.

BLATCHFORD, J. The facts of this case are largely set forth in the judgment rendered by the District Court. The question is one of law, as to what rights were conferred on the libellants by the statute law of the state of Connecticut, in respect to wharfage, so called, on goods in the situation of those involved in the present case. The decision of the highest court of the state of Connecticut on the very question must be accepted as the proper interpretation of such statute law. In 1837 the case of *Union Wharf Co. v. Hemingway*, 12 Conn., 293, an action of assumpsit for the wharfage of goods, brought by the same corporation which is the libellant in this case, was decided by the Supreme Court of Errors of Connecticut. The defendants in that case owned vessels which ran from New Haven to New York and back, and also owned stores or warehouses on the west side of the plaintiff's wharf. These vessels discharged their cargoes at the basin wharf, on the outer side thereof, at a point more than three rods distant from the plaintiffs' wharf; and the goods thus landed upon the basin wharf were transported across the plaintiffs' wharf to the defendants' stores or were transported upon the plaintiffs' wharf to the mainland. Then, as now, the basin wharf abutted on the libellants' wharf, on the east side of the libellants' wharf. Then, as now, the libellants' wharf and the basin wharf were each of them used as a free public highway to pass and repass upon. The proprietors of the libellants' wharf demanded and received wharfage from all parties using it, continuously, from the year 1746. In 1760, the colonial legislature granted to the proprietors of the libellant's wharf a charter, incorporating them as "The Union Wharf Company in New Haven," and recognized their ownership of such wharf, and gave them power to repair and manage the wharf for the future, and to keep accounts, and to take care of the wharfage of the wharf, through a com-

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mittee, which committee should account for the receipts of the company, and to agree with any member to keep the wharf in repair and take the profits till they should satisfy his disbursements. In October, 1801, the legislature of Connecticut (1 *Private Laws of Connecticut*, p. 523,) incorporated the owners and proprietors of the libellant's wharf by the name of "The Union Wharf Company in New Haven." The resolve of incorporation authorized the company "at all times hereafter, to make all necessary contracts for the rebuilding, repairing or extending said wharf and pier in such manner as they shall direct and for keeping the same in repair," and to assign to the contractor the income of the wharf, and the right to collect the wharfage established by the company from time to time until the income should reimburse the expenditure, with interest, after which the income should revert to the company, subject to such reasonable restrictions or extension with respect to repairs and wharfage as the legislature might then think proper to adopt. In May, 1810, the legislature of Connecticut, (1 *Private Laws of Connecticut*, p. 497,) incorporated the libellant by the name of "The Contractors to rebuild and support Union Wharf and Pier in New Haven," and gave the corporation power to make such ordinances as it might find necessary, to regulate the mode of receiving, collecting and enforcing the payment of wharfage. The corporators were authorized to appoint five directors to manage the concerns of the company. The resolve proceeds: "And the directors so chosen may appoint from time to time a suitable person as a wharfinger, who shall have power to collect and receive the wharfage when due, and, upon neglect or refusal to pay the same after notice and demand, it shall be lawful for such wharfinger either to sue at common law, or to distrain for such wharfage, on any goods or chattels found on board the ship or vessel from which the same shall have accrued, and the goods or chattels so distrained to sell and dispose of in the same manner as if taken on execution, and the wharfage due for or on account of any ship or vessel, or the cargo thereof, shall be and remain a lien on such ship or vessel until the same shall be

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discharged." Prior to the resolve of 1810 the Wharf Company had contracted with the parties who became so incorporated in 1810 as the libellant, for the rebuilding, extension and maintenance by the latter of such wharf and pier. Soon after the libellant was so incorporated it rebuilt and extended the wharf and pier, according to such contract, and received from the Wharf Company an assignment of the income thereafter to accrue from said wharf and pier, and the right to collect all the wharfage thereafter to accrue by reason of the use of the same, in any manner, by any parties, from time to time. Afterwards, in October, 1815, the legislature of Connecticut passed a resolve declaring that the libellant "has the right of collecting wharfage to reimburse it for its expenses according to its contract with the Union Wharf Company, at a rate not exceeding a tariff annexed to said resolve," and thereby establishing said tariff accordingly, and further declaring "that neither the claims of any individual or individuals to be exempted from wharfage, nor the claims of said company to demand wharfage of such individual or individuals, shall be in any way affected by this resolve." This tariff fixes as wharfage so much per ton per year, for vessels belonging to New Haven employed in foreign trade, and so much per ton per year for coasting vessels belonging to New Haven, the above to be payable semi-annually, July 1st and January 1st; and so much per ton per day for coasting vessels not belonging to New Haven, and so much per ton per day for sea vessels not belonging to New Haven, with the privilege to vessels not belonging to New Haven to enter at any time for one year by paying in advance the same wharfage as vessels belonging to New Haven. "All goods landed from or put on board coasting vessels" were required "to pay the following rates of wharfage," different articles of merchandise being specified, and the rate of wharfage being fixed at so much each, or so much per ton, or bale or cubic foot, or bag, or thousand, or box, or fifty feet, or hundred weight, or dozen bottles, or dozen or cask, or hogshead, &c. The resolve proceeds: "All other articles not enumerated in same proportion. Goods or mer-

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chandise taken by water from, or by water put on board, coasting vessels lying at, or attached to vessels made fast to the wharf, to pay half wharfage, unless the said goods or merchandise be conveyed to or from the wharf or any store adjoining the same, in which case full wharfage shall be charged. All vessels belonging to this port, which either lie at the wharf, or use it by taking on board or landing any part of their cargo or passengers, shall pay six months' wharfage on the vessel, which vessel shall be entitled to the use of the wharf, if after January, until the next following July; if after July, until the next following January. Vessels coming into this port, which enter by the year, shall pay wharfage at the rates above established, from the time they arrive till the next following January or July. Vessels, owners, masters, and goods are liable for wharfage. * * * All articles landed on the wharf, and remaining more than four days, shall pay in addition for each day after, one-fourth of the established rates of wharfage. All articles brought by land and left on the wharf shall, after the expiration of four days, be liable to the same rate of wharfage as if imported by water, and, if left in such a situation as will incommode the free use of the wharf, and the owner or person having charge thereof shall neglect to remove the same on notice from the wharfinger, the same shall be deemed a nuisance, and may be removed by the wharfinger at the expense of the owner. Ballast deposited on the wharf shall be liable to wharfage, if suffered to remain more than four days without special license from the wharfinger, and, if left on the wharf after the vessel which discharged it shall have departed from the port, shall be forfeited to the use of the company; provided, however, that this resolve shall at all times be liable to be altered or repealed by the General Assembly." The resolve also provided that sea vessels not belonging to New Haven should be liable to "the same wharfage for goods landed or taken off as coasting vessels." The following resolve was passed in May, 1819 (1 *Private Laws of Connecticut*, p. 502): "Upon petition of the contractors praying for an alteration in their tariff of wharfage and proviso contained

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in their former grant—Resolved by this Assembly, that in lieu of said proviso, and the exemptions heretofore claimed, the following alterations of and additions to the rates of wharfage heretofore established be made and become permanent, and not subject to be altered, without the sanction of this Assembly, viz.: 1st. That lumber landed by water, in any of the yards adjoining the wharf, shall pay only one-half the rate of wharfage heretofore established, provided the lumber is owned by the proprietors or occupants of the yard. 2d. Goods or merchandise, other than lumber, landed from a coasting vessel, into any of the back doors of the stores or back yards, if to be exported in a sea vessel, without coming on to the wharf in front of said stores or yards, and all articles landed in the same manner from any vessel employed in foreign trade, and exported coastwise, without coming on to the wharf in front, shall pay only one-half the rates of wharfage heretofore established. 3d. All articles landed from a coasting vessel into any of the stores or yards aforesaid, if to be exported coastwise, and not coming on to the wharf in front, shall pay half the established rate of wharfage when landed, and half when taken off. 4th. No goods or merchandise landed into, or shipped from, any of the back doors of stores, or yards adjoining the wharf, shall be exempted from the payment of wharfage on both landing and shipping, unless owned by the owners or occupiers of said stores or yards. 5th. All articles landed on any part of the wharf, from a coasting vessel, if re-shipped within two days, coastwise, shall pay only one wharfage, provided the said articles have not been carted up or down the wharf, and have not been sold. 6th. Goods shipped and immediately re-landed shall pay only one wharfage. And the petitioners shall have the same power and authority to collect the wharfage hereby established, and to enforce the collection thereof in the same manner, as is provided for the collection of the wharfage heretofore established, any law or provision in said former resolve to the contrary notwithstanding." In 1826 the Union Wharf Company and the libellant entered into an agreement with the Farmington Canal Company, a Conneo-

ticut corporation, whereby the canal company was authorized to construct a canal basin on the east side of the libellant's wharf, and to enclose the seaward side thereof by an embankment or wharf running from the mainland near the foot of Brewery street to the east side of the libellant's wharf, and whereby the canal company was to forever keep in repair the part of the east side of the libellant's wharf, which would be thus included in such basin, and the canal boats and their lading, which should be transported up and down the canal within such basin, were to be free from wharfage from the libellant's wharf; and by which it was provided that all powers and rights not therein especially granted should be retained by the libellant. The canal company obtained due authority and constructed the basin and the embankment, such embankment being what is before referred to as the basin wharf.

Such was the condition of things when the case of *Union Wharf Company v. Hemingway* was decided.

[The opinion here quotes at much length the statement of facts in the report of the case referred to, 12 Conn. R., 293, with the points made by the counsel for the defendants, and gives a great part of the opinion of WILLIAMS, C. J., in which the other judges concurred, except CHURCH, J., who dissented. The opinion then proceeds as follows:—]

It is entirely clear that the state court, in construing the legislative grants to the Union Wharf Company, and to the libellant, and the contract with the canal company, asserted the truth of the following propositions: (1) That goods arriving by water by a coasting vessel, and transported over the libellant's wharf, to reach their place of destination on the mainland, are liable to pay wharfage to the proprietors of such wharf, if they are discharged from such vessel upon the canal wharf or basin wharf, even at a point distant more than three rods easterly from the libellant's wharf, and then pass upon carts over the basin wharf on to the libellant's wharf, and upon the latter wharf to points in the city beyond it; (2) That, under such circumstances, such goods may be fairly said to be landed on the libellant's wharf; (3) That

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the term "wharfage" includes the compensation for such use of the libellant's wharf; (4) That the proprietors of the libellant's wharf, before the construction of the basin wharf, had the right to demand wharfage as compensation for the use of their wharf in transporting over it goods arriving by water in a coasting vessel, though first discharged from such vessel on a wharf four rods distant from the libellant's wharf, if they were afterwards transported over the libellant's wharf to reach their destination on the mainland beyond the libellant's wharf, and that the right to such wharfage was not abridged by anything in the agreement with the canal company, or by anything done thereunder in the construction of the basin or of the basin wharf; and (5) That the owner of the goods liable to such wharfage has no rights as against the claim of the proprietors of the libellant's wharf to such wharfage on such goods which the canal company did not have.

Aside from the binding character of these adjudications of the highest state court on the questions in issue, reference may be made, in support of the correctness of the conclusions arrived at, to provisions before cited, from the resolves of the legislature, to show that the scheme of the legislature was to permit the proprietors of the libellant's wharf to receive wharfage in some cases for the use of the wharf, in respect of goods, even when there was no landing on the wharf, or deposit on or transit over the wharf, of goods which had arrived by water. Thus, by the resolve of 1815, goods taken by water from, or by water put on board of, coasting vessels lying at the wharf, or attached to vessels made fast to the wharf, were required to pay half wharfage, even though the goods were not conveyed to or from the wharf or any store adjoining the wharf. By the same resolve, all articles brought by land and left on the wharf, even though not imported by water, were required, after the expiration of four days, to pay the same rate of wharfage as if imported by water. In another direction, compensation was given directly for the use by goods of the wharf in front of a store or yard, irrespective of the landing of the goods in

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the store or yard, and for the use of the wharf to cart goods up and down the wharf which had been landed on the wharf. Thus, by the resolve of 1819, goods other than lumber landed from a coasting vessel into any of the back doors of the stores or back yards, if to be exported in a sea vessel without coming on to the wharf in front of said stores or yards, and all articles landed in the same manner from any vessel employed in foreign trade, and exported coastwise, without coming on to the wharf in front, were made subject to only one-half of the established rates of wharfage, and all articles landed from a coasting vessel into any of said stores or yards, if to be exported coastwise, and not coming on to the wharf in front, were required to pay only one-half of the landing wharfage, when landed, and one-half of the wharfage for putting on board, when taken off. By the same resolve all articles landed on any part of the wharf from a coasting vessel, if re-shipped within two days coastwise, were required to pay but one wharfage; that is, not wharfage for landing and wharfage for putting on board, but only one of the two, in case such articles had not been carted up or down the wharf, and had not been sold.

The present suit is a libel *in rem* against the steamer J. H. Starin, a packet-boat plying daily between New Haven and New York. On each one of six days in January, February, and March, 1877, she lay for a time in the port of New Haven, at a wharf called the Derby Railroad Wharf, which was within four hundred and sixteen feet of the libellant's wharf, and east of it, receiving and discharging freight and passengers. The Derby Railroad Wharf is a wharf abutting on the basin wharf and running outwardly from it in a southeasterly direction, and about in a line parallel with the libellant's wharf. On the days before named the steamer discharged and received on board a large quantity of goods, as freight, a great part of which were carted upon and over the libellant's wharf, and that part of the basin wharf which lies between the Derby Railroad wharf and the libellant's wharf. If the goods so carted upon and down the libellant's wharf and thence over the basin wharf, and the Derby Railroad

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wharf to the steamer, and those so unladen from the steamer and carted over the basin wharf to, upon, and up the libellant's wharf, had been originally laden upon, or unladen from, the steamer, while lying immediately alongside of the libellant's wharf, the wharfage on the same, which the libellant would have been entitled to charge and collect, would have been \$76.10.

The canal company, before mentioned, in 1836, after it had constructed the basin and the basin wharf, ceased to do business, and prior to January 1st, 1848, it conveyed to the New Haven & Northampton Company all the rights which it had to the canal basin.

In 1845, the legislature of Connecticut, by a resolve, (*Private Laws of Connecticut*, Vol. 4, p. 1380,) gave to the New Haven & Northampton Company the right of collecting wharfage "at their basin wharf," between the libellant's wharf and Tomlinson's wharf, at a rate not exceeding a tariff thereunto annexed, and established said tariff, with the proviso "that neither the claims of any individual or individuals to be exempted from wharfage, nor the claims of said company to demand wharfage of such individual or individuals, shall be in any way affected by this resolve." At the same session of the General Assembly a resolve was passed in these words: "Whereas, a resolution has passed this Assembly at its present session relating to the rate of wharfage on the basin wharf in the city of New Haven:—Resolved by this Assembly, that nothing therein contained shall be construed to affect the rights of the Union Wharf Company, or the Contractors to rebuild and support Union Wharf and Pier in New Haven, to collect wharfage in any case whatever, or any other existing rights of said company." The New Haven & Northampton Company, on the 24th of March, 1848, conveyed to the New York & New Haven Railroad Company all its rights to a part of the canal basin, comprising that part of it opposite to which the Derby Railroad wharf is built, the basin being then disused. On the 7th of September, 1848, the libellant and the Union Wharf Company conveyed to the New York & New Haven Railroad Company,

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the right to cross the libellant's wharf with its railroad, and to fill up a certain part of the flats adjoining the east side of said wharf, within the limits of the canal basin, down to a point seven hundred and thirty-one feet southerly from the libellant's well at the head of said wharf. But the grants and consent were made upon the express conditions, that the grantors reserved the right to collect on all goods landed by water, or taken off by water, on and from the wharves, or embankments, piers or bridges belonging to or constructed or occupied by the railroad company, and connected with the libellant's wharf on either side thereof, the same rate of wharfage as was then collected and received by said grantors on goods landed or taken off by water on and from the wharves attached to and connected with the libellant's wharf on the west side thereof, except on goods carried up or brought down in the cars of the railroad company without otherwise coming on to the libellant's wharf, and except on goods to be used for railroad purposes on said railroad; and on the express further conditions, that no buildings should be erected or placed on the east side of the libellant's wharf within eighty feet of the front line of stores then standing on the libellant's wharf, and that any railroad tracks which might be thereafter placed on the east side of the libellant's wharf, running northerly, should be placed between said wharf and any buildings which might be erected or placed on the east side thereof on said adjoining wharves.

The grantee, in the same deed, agreed that the grantors should have the said power of collecting so reserved by them, and that the grantee would observe all the conditions so expressed as those on which said grants and consent were given and made according to the true intent and meaning of the same.

On the 19th day of July, 1852, the libellant and the Union Wharf Company conveyed to the New York & New Haven Railroad Company permission to fill up its railroad embankment on the east side of the libellant's wharf, to extend southerly to the south side of the basin wharf, from the said point distant seven hundred and thirty-one feet southerly

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from the said well, and to adjoin said embankment to the east side of the libellant's wharf, along the whole length thereof, from the termination of said former grant to the south side of the basin wharf, on the express conditions and reservations that the grantors should have the right to collect the same rates of wharfage on the embankments or wharf which might be built within those limits, and also on and from that part of the basin wharf which extends for a distance of four hundred and sixteen feet of its length from its junction with the libellant's wharf, and also on all wharves which might be constructed or attached to the basin wharf, within such distance of four hundred and sixteen feet, as was then collected by the grantors on the libellant's wharf, except on goods carried up or brought down in the cars of the railroad company without otherwise coming on the libellant's wharf, and except also on goods to be used for railroad purposes on said railroad, with express further conditions as to the erection of buildings to the eastward of the libellant's wharf, and as to constructing a drain, and as to the location of wood-yards and coal-yards, and as to some other minor matters. The grantee agreed that the grantors should enjoy the right of collecting wharfage in the manner and on the wharves before reserved and specified, and that the grantee would observe all the conditions so expressed as those on which such grant and permission was given and made, according to the true intent and meaning of the same.

Under the said grants to the New York & New Haven Railroad Company, the part of the canal basin contiguous to the east side of the libellant's wharf was, prior to the 1st of January, 1874, filled up solid by said company down to the line of the basin wharf, thus barring all immediate access by water to the easterly side of the libellant's wharf, north of the basin wharf. Prior to 1874 all rights, franchises, property, and obligations of the New York & New Haven Railroad Company became legally vested in the New York, New Haven & Hartford Railroad Company. The latter company, on the 9th of October, 1873, by a lease in perpetuity made by it to the New Haven & Derby Railroad Company, gave to

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that company certain rights under which the Derby Railroad wharf, before mentioned, was constructed in 1874.

The evidence shows that ever since the decision in the Hemingway suit, the proprietors of the libellant's wharf have claimed to collect, and have collected, wharfage for the use of such wharf to transport thereon goods coming on to it from the basin wharf and goods going from it on to the basin wharf, which arrived by water in coasting-vessels or were shipped by water in coasting-vessels, and were discharged upon the basin wharf or laden from the basin wharf, except so far as the right to collect such wharfage was expressly parted with by the instrument before recited. It also appears that the libellant exclusively keeps in repair the part of its wharf which lies northerly of its junction with the basin wharf.

The affirmative defence set up in the answer is, that the basin wharf is a part of the mainland and a public highway; that the part of the libellant's wharf which is north of its junction with the basin wharf is a part of the mainland and a public highway; and that the wharf at which the steamer discharged and received said goods is more than three rods distant, to the eastward, from the libellant's wharf.

The question does not seem to be varied at all from what it was when the Hemingway case was decided, so far as regards goods in the situation of those involved in the present case, except so far as it may be varied by the fact that since then the canal basin has been filled up, so that what was then water has become land, continuous with the mainland inside, and continuous with the basin wharf on the outside. But the basin wharf was built and connected with the libellant's wharf by the permission of the libellant, and the libellant necessarily reserved all rights to wharfage which it did not expressly then part with. By the decision of the state court it had the right which is claimed in the present suit. That right was not parted with, in the grants to the canal company, or in the grants to the New York & New Haven Railroad Company, and the claimant can have

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no better position as against the libellant in respect of such right than that company had or than the canal company had. The *locus in quo* of the discharge and shipment of the goods in this case is to the westward of a line crossing the basin wharf at a distance of four hundred and sixteen feet east from the libellant's wharf. The libellant does not make in the present case a claim, by virtue of any of the instruments before recited, to any greater right than has been conferred upon it by statute, but only claims that while the right insisted on in this case was granted to it by statute, it has not parted with such right by any of such instruments.

The fact that the basin wharf is connected with the mainland by the filling in of the canal basin, or by the route thorough Brewery street, cannot vary the libellant's rights in the present case. The wharfage here claimed is for the use of the libellant's wharf by transporting the goods over it. If they had not been transported over it, but had been taken to or from the Derby Railroad wharf by the way of Brewery street, they would not have been subject to wharfage for being transported over the libellant's wharf.

On the evidence, the libellant's wharf must still be regarded as a wharf, in the part of it used by the goods in this case, so that the statutory rights given in respect to it remain, *quoad* such goods and their use of it, however much it may be a public highway in respect to goods not liable to wharfage for the use of it. If the libellant is usurping a franchise which does not belong to it, its title to such franchise can undoubtedly be tried by a proper judicial proceeding in the tribunals of the state. But so long as the libellant's wharf is used for the transportation over it of goods coming from the basin wharf on to it, or of goods going from it on to the basin wharf, which goods have been discharged from, or are afterwards laden on, a coasting vessel, at the point on the basin wharf where the goods in this case were discharged and laden, and so long as the decision in the Hemingway case stands as the interpretation by the highest state court of the resolves of the legislature, so long must this court maintain the claim made by the libellant in this case.

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By the resolve of 1810, it is provided that upon neglect or refusal to pay wharfage after notice and demand, it shall be lawful either to sue for the same at common law, or to distrain therefor to the extent specified; and that the wharfage due for or on account of any vessel or the cargo thereof shall be and remain a lien on such vessel until the same shall be discharged. It is clear that the resolve means that wharfage on cargo is to be a lien on the vessel until such wharfage is paid. It is left to the vessel to see that it is made secure for its liability, which it can well do, having possession of the goods, and being able to take care either that they do not pass over the libellant's wharf, or, if they do, that the proper wharfage therefor is paid.

The claim to a lien for wharfage in this case is such a claim as is cognizable in admiralty. The use of the libellant's wharf facilitated the operation of the steamer in loading and discharging, to such an extent that the legislature thought fit to give a lien on the steamer for the wharfage dues prescribed for the cargo. The use of the libellant's wharf, as it was used in this case, pertained to navigation by water, to such an extent that the implied contract for wharfage, in respect of the goods, may properly be regarded as a maritime contract, of benefit to the steamer, and therefore one the lien given for which by the resolve is cognizable and enforceable in the admiralty. *The Lottawanna*, 21 Wallace, 558; *Ex parte Easton*, 5 Otto, 68; *The Virginia Rulon*, 13 Blatchf. C. C. R., 519. There was a sufficient notice and demand in this case prior to the bringing of the suit.

The libellant is entitled to a decree for \$76.10, with interest thereon from July 1st, 1878, and for \$80.73, its costs in the District Court, and for its costs in this court.

I do not understand the libel in this case as making any claim for wharfage founded on anything except the use of the libellant's wharf by the goods. It does not claim, in addition, that the steamer is liable for any wharfage prescribed for vessels, aside from the liability of the steamer for the wharfage prescribed for the goods. I therefore express no opinion on that question, nor on any question except the one distinctly involved in this case.

Davis v. Vansands.

THEODORE M. DAVIS, RECEIVER OF THE OCEAN NATIONAL
BANK, *vs.* SARAH VANSANDS.

The plaintiff had recovered a judgment *de bonis decedentis* against an administrator of a solvent estate, upon a claim which accrued after the death of the intestate and after distribution of his estate by order of the probate court, and which could not from its nature have been exhibited against the estate during the time limited by the court of probate for the exhibition of existing claims. Execution having been returned unsatisfied, the plaintiff brought an action of debt upon the judgment against the administrator, suggesting a *devastavit*, in order to obtain a judgment *de bonis propriis*. The suggested *devastavit* was a failure by the administrator to take from either of the distributees the bond authorized by Gen. Statutes, tit. 18, ch. 11, art. 2, sec. 9. Held that, in view of the history of the statute, and of the practice under it, the administrator was not guilty of a *devastavit* from the mere fact that such a bond had not been taken.

It being incumbent upon the administrator to take the steps necessary to obtain money for the payment of debts, he can, as a general rule, obtain an order from the court of probate, where personal estate has been exhausted or has been distributed, and after distribution of the real estate, to sell so much of the real estate in the possession of an heir or an alienee as may be necessary to pay a debt which has accrued after the death of the intestate, and which could not from its nature have been exhibited against the estate within the time limited for the exhibition of claims, and which has since been duly presented for allowance as provided by statute.

The heir whose land is sold under such an order may have contribution from the other heirs *equali jure*.

A court of probate in Connecticut does not possess adequate power, after distribution, to enforce payment of this class of claims from the personal estate which had been distributed under its order to heirs or legatees.

The administrator who has conveyed personal estate to the heirs in obedience to the order of the court of probate, and not by his voluntary act, can bring a bill in equity to compel the heirs who have received such estate to contribute to the extent of the estate so received, and pay such newly accrued debt and the expenses of the administrator in defending against the claim. Such a bill is sustainable although unsold real estate is in the possession of the heir or alienee.

The creditor whose right of action accrued after the time limited by the court of probate for the exhibition of claims, and who has obtained judgment against the administrator or executor in a suit instituted within the statutory time, can proceed by bill in equity against the heirs and legatees of a solvent estate, who have received personal estate, for contribution to the payment of the judgment to the extent of the estate which they have received. If both real and personal estate have been distributed, it is not necessary that the real estate should be exhausted before the creditor can bring his bill in equity for contribution.

Davis v. Vansands.

Whether real estate in the possession of the heir can be subjected to the payment of such a judgment by *scire facias*: *Quære*.

ACTION of debt on a judgment; in the District Court of the United States for the District of Connecticut, February term, 1879. The case is fully stated in the opinion.

W. Howe, for the plaintiff.

C. E. Perkins, for the defendant.

SHIPMAN, J. The plaintiff, as receiver of the Ocean National Bank, heretofore recovered judgment in this court, payable out of the estate of the intestate, against the defendant as administratrix of the estate of Horace Vansands, for the amount of an assessment upon the stock of the intestate in said bank. The claim of the plaintiff accrued after the time limited by the court of probate for the presentation of claims, and after the distribution of real and personal estate of about the value of \$33,000 among his heirs under the order of the probate court.

The facts were similar to those in the case of *Davis v. Weed*, 44 Conn., 569. Execution was issued and was returned unsatisfied.

The plaintiff has now brought an action of debt upon the judgment against the defendant as administratrix, suggesting a *devastavit*. Judgment is sought *de bonis propriis*. If the defendant has been guilty of waste and mismanagement of the estate and effects of the deceased, she is liable in this form of action. *Wheatley v. Lane*, 1 Wms. Saunders, 252, note 2; *Olmsted v. Clark*, 30 Conn., 109. The *devastavit* which is suggested in the declaration is that the defendant did not exact and receive from either of the distributees the bond, which is authorized by the statute, (General Statutes of Connecticut, 374,) with surety to the state, to the acceptance of the court of probate, conditioned that if, after the settlement of the estate, debts shall appear and be allowed, he or she will pay to the administratrix his or her proportional share of such debts and of the charges of the administratrix.

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This statute was enacted in 1699. The first statute authorizing courts of probate to limit a time within which claims should be presented against solvent estates was passed in 1782. Previously, creditors of solvent estates could present their claims as if the debtor was living. In *Griswold v. Bigelow*, 6 Conn., 258, decided in 1826, the court said that "since the legal authority given to the court of probate to limit the exhibition of demands" it was not usual to take such a bond. I am satisfied from inquiry of some of the oldest and most experienced lawyers of the state, that the statute has been practically disused for nearly fifty years. This being the history of the statute and of the practice under it, it would be manifestly improper to find an executor or administrator guilty of a *devastavit* from the mere fact that such a bond had not been taken.

The question still remains as to the manner of procedure for enforcing payment of the judgment. This question, although one of much practical importance, has not been presented for judicial determination in this state in the various phases in which it arises in practice.

It is the duty of the administrator to pay the debts, and to take the steps which are necessary to accomplish that result. If he refuses, he can be removed and a new administrator can be appointed. The principle which subjects the real estate which has descended to the heir from the ancestor to the payment of his debts is stated in *Griswold v. Bigelow*, 6 Conn., 258, substantially as follows:—the real estate of a person deceased is a fund for the payment of debts, upon deficiency of personal assets, and the land remains subject to a lien for this purpose after distribution and alienation to a bona fide purchaser. This lien, though not perpetual, continues for a reasonable time after the claims accrue, and is not defeated except by the neglect or laches of the creditor. The heir receives title from the ancestor subject to the lien of creditors, and cannot aliene the land to their prejudice, provided they are not guilty of laches in the enforcement of their claims. *Watkins v. Holman*, 16 Pet., 25; *Ricard v. Williams*, 7 Wheat., 59. The ordinary mode in the United

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States of making real estate available to pay the debts of the deceased owner is through the executor or administrator, who is directed by the court of probate upon a deficiency of personal estate to sell so much of the land as will be sufficient to pay the remaining debt. In some of the states, by statute, an execution upon a judgment against the executor *de bonis testatoris* may be levied upon the lands in possession of the heir. 1 Greenleaf's Cruise, 60, note; *Gore v. Brazier*, 3 Mass., 523. In this state, when the personal estate has been exhausted, or has been distributed, and after the distribution of the real estate, the administrator can as a general rule obtain an order from the court of probate to sell so much of the real estate as shall be sufficient to pay the debts which accrued after the death of the debtor, and which from their nature could not have been presented within the time limited for the exhibition of claims, and which have been thereafter duly presented for allowance as provided by statute, together with the charges allowed by the court. The heir whose land is sold by the executor or administrator may have contribution from the other heirs, *equali jure*. *Griswold v. Bigelow*, 6 Conn., 258; *Seymour v. Seymour*, 22 Conn., 272.

I am of opinion that a court of probate in Connecticut possesses no adequate power, after distribution, to enforce payment of this class of claims from personal estate which has been under its order distributed to heirs or legatees. Although personal estate in the hands of the administrator is the primary fund for the payment of debts, the creditors have no specific lien upon it as they have upon real estate. The legal title to personal estate vests in the administrator and is changed by a distribution to the heirs. Their right on the death of the intestate is a vested and transmissible equitable right, subject to the exhaustion of the property by the payment of debts and charges; they receive the legal title and the possession through the medium of a distribution. *Griswold v. Bigelow*, 6 Conn., 258; *Kingsbury v. Scovill*, 26 Conn., 349. The court of probate does not seem to have been vested with authority, after a distribution of personal

property, to compel a reconveyance by the heirs, or a sale by the administrator, or to compel a contribution. It cannot enforce a decree against the heirs by attachment for contempt, unless authorized by statute.

But the administrator or executor who has conveyed the personalty in obedience to the order of the court of probate, and not by his voluntary act, may bring a bill in equity to compel the heirs who received such estate to contribute to the extent of the estate so received, and pay the newly accrued debt, and the expenses of the representative in defending against the claim. 1 Story's Eq. Jur., § 503; *Lupton v. Lupton*, 2 Johns. Ch., 614. The executor or administrator may bring such a bill, although there is real estate in the possession of the heir or alienee which has not been sold by order of the court of probate.

The creditor whose right of action accrued after the time limited by the court of probate for the exhibition of claims and who has obtained judgment against the executor in a suit instituted within the statutory time, may also proceed by bill in equity against the heirs or legatees of a solvent estate who have received personal estate from the representative, for contribution to the extent of the estate which they have received. *Booth v. Starr*, 5 Day, 419.

The general principle that creditors of an estate have a remedy in chancery after distribution against legatees for contribution has been elsewhere well recognized. Story's Eq. Jur., § 503; *Riddle v. Mandeville*, 5 Cranch, 322. The second case of *Booth v. Starr*, in which the property in the possession of the guardian of the sole heir was personal property, has not been overruled or dissented from by the courts of this state. The other modern Connecticut cases in regard to the means of enforcing payment of a claim against a deceased person's solvent estate which accrued after settlement, were cases in which there was distributed or undistributed real estate in the possession of the heirs, or in which there was personal property of the estate in the hands of the executor.

In such cases it is said that the remedy must be by suit

against the administrator or executor, if he refuses to pay the debt. After judgment, the real estate can be subjected to the payment of the debt. No method of reaching the real estate has been pointed out except by sale through the intervention of the court of probate. *Bacon v. Thorp*, 27 Conn., 251; *Hawley v. Botaford*, 27 Conn., 80. When personal estate has been distributed, the heirs can be made to contribute and pay the creditor, after judgment in an appropriate suit has been obtained against the representative, and contribution can be obtained by bill in equity. If both real and personal estate have been distributed, it is not necessary that the real estate should be exhausted before the creditor can bring his bill in equity against the heirs for contribution.

It has been suggested that the real estate in the possession of the heirs may be subjected to payment of the judgment debt by *scire facias* prayed out by the creditor, upon the ground that the heirs have become chargeable with payment of the judgment, and that execution upon the *scire facias* may be levied upon the real estate. I do not examine this question, because the general practice in the United States seems to have been to subject lands to the payment of debts through the intervention of the courts of probate, unless some other course is authorized by statute.

Let judgment be entered for the defendant.

ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS.

ADVERSE USER.

See EQUITY, 5.

AFTER-ACCRUING CLAIMS.

See EXECUTORS AND ADMINISTRATORS, 2-8.

AMENDMENT.

See PRACTICE, 1.

APPEAL.

See STATUTES (CONSTRUCTION OF), 1, 2.

ASSESSMENT FOR BENEFITS.

See CITY ASSESSMENTS.

ASSIGNMENT OF FUTURE EARNINGS.

W went into the employment of the defendants under an arrangement by which he was to commence working for them, and to work whenever they had work for him, of which they were to give him notice, but nothing was agreed as to the length of time that he should continue in their employment. Before commencing work he assigned to *A*, by an order on the defendants, all money to become due to him while in their employ. This order was accepted by the defendants and put on record as required by the statute. Afterwards, and while *W* was in the defendants' employment, they were factorized as his debtors by one of his creditors. Held that the wages earned up to the time of the attachment could be held by *A* under the assignment. *Harrop v. Landers, Frary & Clark Co.* 561

ASSUMPSIT.

1. General assumpsit for money had and received will not lie against the guarantors of a note. *Allen v. Rundle.* 528
2. The ground on which a promissory note is evidence under the general counts is that it is presumed that money has been received by the maker. But a guarantee of a note creates no such presumption. *ib.*

3. And held that it could not be shown in parol that the defendants, though in form guarantors, in fact undertook thereby to obligate themselves to pay the note. *ib.*
4. Nor that they made at the time a verbal promise to pay the debt. *ib.*

ATTACHMENT.

See BOND FOR PROPERTY ATTACHED, 1; EQUITY, 2.

BANKRUPTCY.

Personal property was attached by the plaintiffs and a receipt under seal given for it to the officer by the defendant and another, acknowledging the attachment, and a certain value of the property, and promising to redeliver it on demand or pay the judgment obtained. A year after, and while the suit was pending, the defendant went into bankruptcy and made a composition with his creditors under the bankrupt law. The claim in suit was put by him into his schedule and notice given the attaching creditors, who refused to join in the composition or to accept the composition notes when tendered. The court below rendered judgment in the suit for the full amount of the debt, with an order that the execution be collected only out of the property attached. Held, on a motion in error—
1. That the defendant could not be heard to deny that there was a valid attachment of the property. 2. That the composition proceedings had not affected the plaintiffs' right to judgment in the suit for the full amount of the debt. 3. That the form of the judgment, limiting its operation to the property attached, was right. *Alsop v. White.* 499

BOND FOR PROPERTY ATTACHED.

The statute (Gen. Statutes, tit. 19, ch. 2, secs. 23, 27,) provides for the giving of a bond with surety by a defendant in substitution for property attached in the suit, by which the obligors bind themselves to pay the judgment that may be recovered, or the actual value of the interest of the defendant in the attached property. Held, in a suit on such a bond, that in assessing the damages the value of the

property at the time the bond was given was to be taken, and not its value at the time of the judgment rendered or demand made. *Perry v. Post.* 354

BOND IN CRIMINAL PROCEEDING.

1. In debt on a bond given to a town in a criminal cause, the defendant can not set off a claim against the town. The debts are not "mutual debts" within the meaning of the statute. *Town of Wallingford v. Hall.* 350
2. The town in taking the bond acts as the representative of the sovereignty of the state, and is not in the ordinary sense a creditor. *ib.*
3. It is no defense against such a bond that the grandjuror who made the complaint in the criminal cause was, at the time the bond was given, the tenant of the magistrate before whom the case was brought and who took the bond. *ib.*
4. Nor that the magistrate had been previously consulted with regard to matters connected with the offense, which was an assault, by the person upon whom the assault was committed. *ib.*
5. Nor that at the time the complaint was made the accused had been previously arrested for the same offense, given bond for his appearance, and forfeited his bond. *ib.*
6. The statute requires a bond to be given that the accused shall "appear and abide the order of the court." The bond taken was that he should "appear, to answer to said complaint and abide the order of the court thereon." Held that the difference was immaterial. *ib.*
7. It was claimed that the bond, which was for the appearance of the accused at an adjourned court, was prematurely called. It appeared by the record to have been called at the hour to which the court stood adjourned. The accused did not make any appearance during the hour following. Held that, if the question could be made in this court, as presumptively the forfeiture would have been opened and the accused allowed to appear if he had presented himself within the hour, it did not appear that the defendant had suffered by the calling of the bond at the time it was called. *ib.*

BOROUGH.

See **MUNICIPAL LIABILITY, 1.**

BUILDERS' LIEN.

A husband having a life estate in a house and land connected therewith of which his wife owned the fee, contracted with the petitioners, who were builders, to construct two small buildings and two hundred feet of fence on the land. They erected the buildings and fence, with the knowledge and consent of the wife, who with her husband lived in the house, but with no contract with or request

from her, and the husband had no authority and did not assume to act as her agent in the matter. Held that the petitioners were entitled to a lien only upon the life estate of the husband. *Gilman v. Disbrow.* 563

CITY.

See **MUNICIPAL LIABILITY, 1.**

CITY ASSESSMENTS.

1. Under the charter of the city of Hartford all land specially benefited by a city improvement is liable to be assessed for the expense of such improvement. Held that a piece of land owned by a school district, upon which its school-house stood, and which was used solely for school purposes, and of which no other use was contemplated in the future, was not so benefited that it could be assessed for the expense of a street laid out by the city near it. *City of Hartford v. West Middle District.* 462
2. To render an assessment of benefits legal, it must appear that the benefit is direct and immediate, not contingent and remote. *ib.*

COMMISSIONERS ON INSOLVENT ESTATES.

1. Commissioners on an insolvent estate are a special statutory tribunal, created for the sole purpose of determining what claims are entitled to payment from the estate; and their action does not constitute a judgment that can be used for any other purpose. *First National Bank v. Hartford Life & Annuity Co.* 23
2. G had pledged to the plaintiffs, as security for a loan of money, certain stock of the defendants, a corporation of which he was a member, by a mere delivery of the certificate of the stock and a power of attorney for its transfer. He was also indebted to the defendants. G died insolvent. Both creditors presented their claims to the commissioners on his estate, and they, considering the plaintiffs as having a valid pledge of the stock, deducted its value from the amount of their claim and allowed only the balance; at the same time allowing the defendants' claim with no deduction on account of the stock. Neither party appealed from the report of the commissioners. Held that there was nothing in the action of the commissioners that estopped the defendants, in a suit in which the plaintiffs claimed to be the owners of the stock, from asserting their right to a lien upon the stock under the statute. *ib.*

CONFLICT OF LAWS.

1. Where property has once vested in an assignee or receiver by the law of the state where the property is situated, the law of another state will not divest him of his right to

it, if he should take it into such state in the performance of his duty. *Pond v. Cooke.* 126

2. A receiver of an insolvent manufacturing corporation appointed by a court in New Jersey where it was located, took possession of its assets, and for the purpose of completing a bridge which it had contracted to build in this state, purchased iron with the funds of the estate, and sent it to this state. Held—that the iron was not open to attachment in this state by a creditor residing here. *ib.*
3. And held that a party giving a receipt for the property to the officer who attached it, and taking it into his possession, was not liable to nominal damages in a suit brought upon the receipt after a demand and refusal. *ib.*
4. A receiver appointed by a court in such a case stands in the same position as an assignee or trustee in insolvency. *ib.*

CONSTITUTIONAL LAW.

The commissioners on an insolvent estate of a deceased person made their report and no appeal was taken within the twenty-one days allowed by law. A month after the time for appealing had expired the General Assembly passed a special act allowing appeals to be taken from the doings of the commissioners on that estate within twenty-one days after the rising of the Assembly. Held that the act was constitutional and valid. *Wheeler's Appeal from Probate.* 306

CONTEMPT.

1. The power of a committee or public officer to commit for a contempt, where authorized by an act of the legislature to summon witnesses and examine them under oath, should not be left to implication, but should clearly appear on the face of the act. *Noyes v. Byrbee.* 382
2. The power given by statute to the insurance commissioner to investigate the financial condition of any life insurance company of the state, to summon its officers before him, to compel their attendance and the production of papers, and to examine them under oath, does not authorize him to commit for contempt in refusing to be sworn and to answer questions. *ib.*
3. Pending a proceeding for contempt in disobeying an injunction against the diversion of water from a spring, the plaintiff and defendant entered into an agreement by which the proceeding was to be continued to a future day, and the defendant was to use all practicable means to restore the stream, to pay the plaintiff his expenses in the suit, and also to pay him such damages as they should agree on, or, if they could not agree, as should be fixed by a referee, and after their payment to give the plaintiff a bond with surety that his

right to the water should not be disturbed; and when this was done the proceeding was to be withdrawn. The defendant restored the stream so far as it could be done and paid the expenses of the suit, but did not pay the damages nor give the bond. It appeared however that, for the purpose of settling the damages, he had called on the plaintiff for a statement of his claim with regard to them, which the latter refused to give. Held that the defendant was not liable to a judgment for contempt. *Hull v. Harris.* 544

CONTRACT (CONSTRUCTION OF).

See REPRESENTATIONS UPON A SALE, 1.

CORPORATION.

See MUNICIPAL LIABILITY, 1; STOCK (TRANSFER OF), 1, 2.

COSTS.

The act of 1875 (Session Laws, 1875, p. 31,) provides that "in all suits where a cause of action shall be sustained in favor of or against only a part of the parties thereto, judgment may be rendered in favor of or against such parties only; but any defendant against whom no recovery shall be obtained shall be entitled to costs." Held that where there were several defendants thus entitled to costs there could be but one bill of costs allowed. *Sanford v. French.* 101

DAMAGES.

The defendant attached the plaintiff's personal property, and a few days after abandoned that attachment, and attached it again on another writ. In the latter suit he afterwards obtained judgment, and the property was sold upon execution and the proceeds applied in part payment of the judgment. In an action of trespass and trover for the taking and conversion of the property, it was held that the damages which the plaintiff was entitled to recover were only for the original taking of the goods and their detention until the second attachment. *Lazarus v. Ely.* 504

See BOND FOR PROPERTY ATTACHED, 1; EVIDENCE, 4, 5, 6; TROVER, 3, 4.

DEFAULT.

1. Evidence not admissible by reason of variance is not rendered admissible by the fact that the defendants have suffered a default, and the case is being heard in damages. *Shepard v. New Haven & Northampton Co.* 54
2. The admission by a default is only of the cause of action stated in the declaration. *ib.*

EASEMENT.

See EQUITY, 5.

EQUITY.

1. A bill in equity alleged that a railroad cor-

- poration, empowered to issue bonds to be used in completing the road and to secure them by a mortgage of its property, duly issued its bonds and disposed of a large number of them to divers persons, who were bona fide holders of the same and entitled to receive the money due thereon and to the benefit of the mortgage. Held to be a sufficient averment that the bonds were lawfully issued and used. *Mead v. New York, Housatonic & Northern R. R. Co.* 199
2. After the bonds were issued and the mortgage executed, and while both were outstanding unsatisfied, but before the mortgage had been recorded, a creditor of the company, with knowledge of all the facts, attached and afterwards levied his execution upon the mortgaged property. Held that he stood no better than if, with such knowledge, he had taken a conveyance of the property, and that he did not obtain priority of title. *ib.*
 3. A court of chancery in this state has jurisdiction of a bill for the foreclosure of such a mortgage, although embracing property out of this state as well as within it. *ib.*
 4. It is a well established principle that a court of chancery, acting primarily *in personam* and not merely *in rem*, may, where a person against whom relief is sought is within the jurisdiction, make a decree, upon the ground of a contract or an equity subsisting between the parties, respecting property situated out of the jurisdiction. *ib.*
 5. *C.* owning two dwelling-houses upon adjoining lots, and having a right to the water from a spring upon land of another party for use at the houses, sold one of the houses to *L.* In the negotiation he had agreed that *L.* should have one-half the water from the spring and that they should at their joint expense lay a pipe from the spring to a point near the houses, from which each should lay a pipe to his own house at his own expense. This agreement was not put into the deed; nor in writing, but it had a controlling influence in inducing *L.* to purchase. The pipes were thus laid, at an expense to *L.* of \$100. Afterwards *C.* purchased the lot containing the spring, and some time after sold that lot with his dwelling-house to *H.*, who bought with full knowledge of the agreement with *L.* as to the water and pipes. After his purchase *H.* demanded payment of *L.* for the further use of the water, but *L.* continued to take it as before, claiming the right to do so under the agreement with *C.* *H.* forbade *L.* to take water from the spring and finally cut the pipes on his own land. *L.* had used the water under the agreement for more than fifteen years from the time of the purchase. Upon a petition for an injunction against *H.*, it was held—1. That the agreement of *C.* with *L.* was not a mere license, but that *L.* acquired under it an equitable right. 2. That *L.*, by his use of the water under a claim of right for fifteen years, had acquired a legal title to the easement. 3. That *L.* had a right to enter upon the land of *H.* to repair the pipes and put the spring in order. 4. That the remedy by action at law for damages was entirely inadequate, and a court of equity had jurisdiction. 5. That *H.* should be enjoined, not only from doing any act that should prevent *L.* from taking water from the spring, but from using the water in any manner that should deprive *L.* of the use of one-half of it. *Legg v. Horn.* 409
 6. A widow owning a life estate under the will of her husband in certain lands, joined with a part of the reversioners, all of whom were tenants in common, in making a mortgage by metes and bounds of a portion of the lands, the mortgage note being signed by them jointly, and the money obtained on the mortgage being used by the life tenant in repairs on the premises. The other mortgagors afterwards sold their interests in all the lands to *R.* The mortgagees afterwards brought a bill of foreclosure against *R.* and the life tenant, and after the foreclosure became absolute by a failure to redeem *R.* purchased the interest of the mortgagees, paying him therefor the amount of the mortgage debt and costs. The life tenant afterwards brought a bill in equity against *R.*, alleging that she had no notice of the foreclosure proceedings, and praying to be allowed to redeem on paying to *R.* what he had paid the mortgagee, with interest, which right was decreed to her. She afterwards paid the amount to *R.*, and then, after demand made, brought a bill in equity to compel *R.* to contribute towards the amount paid by her in redeeming or be foreclosed of all right to redeem his interest in the land. Held—1. That *R.* could not set up the fact that the mortgage was void, the court in the first bill of the petitioner against him having found the fact of the mortgage and of the amount due under it, and having therefore necessarily found its validity. 2. That although the first bill of the petitioner against *R.* could have been so framed that the whole question between the parties could have been settled by a single decree, yet the fact that she had brought that bill and obtained a decree under it did not preclude her from bringing the present bill, the objects of the two bills being entirely different, although the general facts alleged were the same. 3. That it could not be presumed that the petitioner as tenant for life was liable for waste, nor that any waste had been permitted by her, nor that the money was expended for repairs which she was required to make. *Lyons v. Robbins.* 513
 7. A tenant in common of an equity of redemption, if he redeems, must pay the whole mortgage debt, and can not compel the mortgagee to accept such portion of the mortgage debt as is represented by his interest in the land. *ib.*
 8. And having paid the whole mortgage debt

he has no right of contribution against his co-tenants personally, but his only remedy is by a foreclosure of their interests in the land if they fail to pay their share; and they have the option to pay or give up their interests.

- 16.
9. A petition in equity averred that the respondent had by fraudulent representations obtained of the petitioner his note and had brought an action upon it, and prayed for the cancellation of the note and a perpetual injunction against the prosecution of the action. The note was non-negotiable, was dated in June, 1872, and had seventeen years to run from its date. The petition was brought in December, 1873. The respondent demurred to the petition on the ground that the petitioner had adequate remedy at law by a defence to the pending action. Held that, as the petitioner had no control over the action at law, but the respondent might withdraw it and wait several years before bringing another, the remedy at law was not adequate. *Buxton v. Broadway.* 540

10. Certain real estate was conveyed by a vendor to a married woman for her sole use, for the sum of \$24,000, of which she paid \$9,000, and with her husband gave a note for \$15,000, secured by a mortgage back of the land. The husband afterwards paid the note from his own funds, and had the mortgage discharged. Afterwards the wife, who had expended \$1,000 in improvements on the property, executed an absolute deed of it to her husband, who gave her his bond for \$10,000 and a mortgage of the property to secure it, the object of this arrangement being to secure to the wife the \$10,000 which she had advanced, and which they both regarded as the amount of her interest in the property; but neither the deed nor mortgage was put on record until two years afterwards. Shortly before they were recorded the husband made an assignment of all his property for the benefit of his creditors, and in the schedule attached to the assignment included this property, as of the value of \$25,000, less the mortgage of \$10,000 upon it. The assignee having taken possession, the husband and wife brought a petition in equity against him, alleging that the deed from the wife to the husband was of no validity, and that the assignment conveyed nothing to the assignee, but that it created a cloud upon her title, and praying that the title be confirmed in her. Held—1. That it was clear upon the facts that the taking of the conveyance in the first instance to the wife was not intended by him or understood by her to be a gift of the property to her. 2. That the title must be regarded as placed in her name as a security for the re-payment of her advancement upon it, and in trust to convey the property, subject to that lien, to him or to such person as he should appoint. 3. That the deed of the wife to the husband,

taken in connection with the giving of his note to her for the \$10,000 and a mortgage back to secure it, if effective for no other purpose, was in the nature of a formal written declaration of that trust. 4. That the husband's subsequent conveyance to the assignee was equivalent to notice to her of an appointment by him of the person to whom he wished her to convey, and to a request that she should convey to the appointee, subject to her lien. 5. That the wife was therefore not entitled to the decree prayed for, but that the assignee was entitled to the property subject to her lien of \$10,000 and interest, and to the payment to her of certain sums which it was found that she had since expended upon the property, and which she was equitably entitled to have re-paid. 6. That the court below should order a sale of the property by the assignee, and an equitable division of the proceeds with the wife upon the above principles. *Grain v. Shipman.* 573

ESTOPPEL.

See EQUITY, 6.

EVIDENCE.

1. *H* in 1854 being embarrassed entrusted certain property to *N*, to be sold, and after the payment of certain debts the surplus to be returned to him. In 1862 the last portion of the property was sold to one *B* and his note payable to *N* taken in payment. In 1868 *H* and *N* executed the following mutual release under seal:—"The undersigned having had mutual dealings in former days have reviewed the same, and though there is justly due a balance from *H* to *N*, yet, in consideration of love and affection and of one dollar, we each release to the other all obligations and demands whatsoever." At this time there remained unpaid the sum of six hundred dollars on the note of *B*, which was afterwards received by *N*. In assumpsit brought by *H* against *N*'s executor for the recovery of the money, it was held that proof was not admissible, that, at the time the release was given, *N* told *H* that the money remaining unpaid on *B*'s note should not be included in the release. *Drake v. Starks.* 96
2. The defendant had given the plaintiff his note for certain real estate conveyed to him by an absolute deed by the plaintiff. Held, in a suit on the note, that parol evidence was admissible, on the part of the defendant, to show that the conveyance was not intended as a sale, but was made by the plaintiff for a certain purpose of his own, and upon an understanding with the defendant that the land was afterwards to be conveyed back, and that the note was given at the time under an agreement that it was not to be paid. *Schindler v. Mulheiser.* 153
3. In an action for slander in charging the plaintiff with dishonesty, the defendant, for the purpose of lessening the damages, offered

evidence of the plaintiff's bad reputation in that respect. The court limited him to ten witnesses. Held to be a ground for granting a new trial. *Ward v. Dick.* 235

4. In trespass for an assault the provocation given by the plaintiff, though offered in evidence in justification of the assault, may yet, if insufficient for this purpose, be considered by the jury in mitigation of damages. *Burke v. Melvin.* 243
5. And it makes no difference that the plea is the general issue, with notice only that the facts would be proved as a justification. *ib.*
6. The whole case, with all its circumstances, is to go before the jury, to be considered by them in fixing the damages. *ib.*
7. Where the defendant conspired with several others to commit a rape, and they together seized the woman and carried her into an alley, and the defendant, after sexual intercourse with her, fled, it was held that the acts and declarations of the others after he left were admissible against him. *State v. Shields.* 256
8. The court charged the jury that if the woman was intoxicated at the time, or so far under the influence of liquor that her faculties for observation and understanding were impaired, then her evidence alone and unsupported would not be sufficient for a conviction, but that if her testimony was so far corroborated by other circumstances in the case as to carry conviction to their minds beyond a reasonable doubt, and to the extent that the evidence of one full credible witness would do, it would be sufficient. Held to be no error. *ib.*
9. And held that evidence that the woman had during the year preceding been several times intoxicated, was not admissible. *ib.*
10. The court also charged that a common prostitute was a competent and might be a reliable witness; and that it was for the jury to judge, taking the habits of the woman and all the circumstances into consideration, whether she was a credible witness. Held to be no error. *ib.*
11. The court also charged the jury, with regard to the effect of evidence of good character, that if the jury were satisfied beyond reasonable doubt of the guilt of the accused the question of character was of little consequence, but if upon all the evidence offered there existed a reasonable doubt it became one of great importance, because it tended not only to rebut the presumption of guilt growing out of the facts proved, but to strongly fortify the presumption of innocence which belongs to every person until proved guilty. Held that, while evidence of good character was to be considered by the jury in coming to any conclusion upon the case, yet the charge was not open to exception as conveying a different idea. It was to be understood as explaining merely the degree of

weight to be given to the evidence of good character in its relation to the other evidence in the case. *ib.*

See ASSUMPSIT, 2, 3, 4; INSURANCE (FIRE), 2; RAILROAD (HORSE), 1.

EXECUTION (LEVY OF).

An execution in favor of the plaintiff was levied on a piece of land and the execution returned satisfied. The land proved to be subject to the debts of an estate to which it had belonged, and was afterwards sold by order of the probate court to pay the debts. There were reasons for regarding the order of sale as defective, but it was not void. Held, in an action of debt on the judgment—1. That if the sale was valid it vested a title in the purchaser that must prevail over that of the plaintiff. 2. That the order of sale, if defective, was good until set aside on appeal. 3. That it was not the duty of the plaintiff, for the purpose of protecting his own title, to have taken an appeal. 4. That the levy of the execution proving to be fruitless, the judgment was unsatisfied, and an action of debt upon it could be maintained. *Clarkson v. Beardsley.* 196

EXECUTORS AND ADMINISTRATORS.

1. It is the duty of an executor to apply to the court of probate, within a reasonable time after the settlement of his administration account, for an order of distribution; and where property is lost by his neglect to do this, he is chargeable with the loss. *Sanford v. Thorp.* 241
2. The plaintiff had recovered a judgment *de bonis decedentis* against an administrator of a solvent estate, upon a claim which accrued after the death of the intestate and after distribution of his estate by order of the probate court, and which could not from its nature have been exhibited against the estate during the time limited by the court of probate for the exhibition of existing claims. Execution having been returned unsatisfied, the plaintiff brought an action of debt upon the judgment against the administrator, suggesting a *devastavit*, in order to obtain a judgment *de bonis propriis*. The suggested *devastavit* was a failure by the administrator to take from either of the distributees the bond authorized by Gen. Statutes, tit. 18, ch. 11, art. 2, sec. 9. Held that, in view of the history of the statute, and of the practice under it, the administrator was not guilty of a *devastavit* from the mere fact that such a bond had not been taken. *Davis v. Vansands.* 600
3. It being incumbent upon the administrator to take the steps necessary to obtain money for the payment of debts, he can, as a general rule, obtain an order from the court of probate, where personal estate has been exhausted or has been distributed, and after distribu-

- tion of the real estate, to sell so much of the real estate in the possession of an heir or an alienee as may be necessary to pay a debt which has accrued after the death of the intestate, and which could not from its nature have been exhibited against the estate within the time limited for the exhibition of claims, and which has since been duly presented for allowance as provided by statute. *ib.*
4. The heir whose land is sold under such an order may have contribution from the other heirs *equali jure*. *ib.*
 5. A court of probate in Connecticut does not possess adequate power, after distribution, to enforce payment of this class of claims from the personal estate which had been distributed under its order to heirs or legatees. *ib.*
 6. The administrator who has conveyed personal estate to the heirs in obedience to the order of the court of probate, and not by his voluntary act, can bring a bill in equity to compel the heirs who have received such estate to contribute to the extent of the estate so received, and pay such newly accrued debt and the expenses of the administrator in defending against the claim. Such a bill is sustainable although unsold real estate is in the possession of the heir or alienee. *ib.*
 7. The creditor whose right of action accrued after the time limited by the court of probate for the exhibition of claims, and who has obtained judgment against the administrator or executor in a suit instituted within the statutory time, can proceed by bill in equity against the heirs and legatees of a solvent estate, who have received personal estate, for contribution to the payment of the judgment to the extent of the estate which they have received. If both real and personal estate have been distributed, it is not necessary that the real estate should be exhausted before the creditor can bring his bill in equity for contribution. *ib.*
 8. Whether real estate in the possession of the heir can be subjected to the payment of such a judgment by *scire facias*: *Quære*. *ib.*
- right to construct wharves upon the soil below that line, if they conform to such regulations as the state shall see fit to prescribe, and do not obstruct navigation. *State v. Sargent*. 358
2. The duty of protecting the paramount right of navigation rests upon the legislature, and they are to determine for themselves by what methods and instrumentalities they will discharge it. *ib.*
 3. They have power to vest in commissioners appointed by themselves authority to restrain such proprietors from extending structures into navigable waters. *ib.*
 4. The enactment of such a law is in no sense an exercise of the right of eminent domain. The public do not appropriate or use any right of the land-owner in the soil of the shore. *ib.*
 5. The act of 1872, establishing a board of commissioners for New Haven harbor, to be appointed by the Governor with the advice of the Senate, in one section gives the board power to prevent and remove encroachments upon the waters of the harbor, in another section authorizes them to prescribe harbor lines beyond which no structure should be extended, giving notice to all persons interested to appear and be heard and making a report to the General Assembly, and in another section makes any structure within the tide-waters of the harbor, not approved by the commissioners, a public nuisance, and authorizes the commissioners to bring suits in the name of the State to stop any such erection. Held—1. That the act was constitutional and valid. 2. That it was not necessary for the commissioners to establish a general harbor line before forbidding or removing any particular encroachments. *ib.*

HIGHWAY.

See CITY ASSESSMENTS, 1.

HIGHWAY (LAYING OUT OF).

Upon a hearing of a highway petition before a committee the petitioner offered, under the statute, a bond purporting to bind the obligors to construct the road for a sum named. The respondents objected to it as inadmissible, and the counsel for the petitioners thereupon stated that if upon examination of the statute, which was not then at hand, it should be found that the bond did not conform to the statute, they should claim the right to amend it. The respondents did not assent to this, but the committee received the bond and consented that it might be amended if necessary; but finally became satisfied on examination of the statute that it was not admissible, and laid it out of the case. After the close of the hearing, at a subsequent day, the petitioner's counsel sent the committee a new bond which was drawn in conformity with

FORECLOSURE.

See EQUIT, 3, 8; MORTGAGE, 1.

FOREIGN ATTACHMENT.

1. A garnishee stands no worse in a factorizing suit than if he had been sued by his creditor. *Curtis v. Alford*. 569
2. A garnishee held not liable on a *scire facias* where, at the time of the garnishment, something remained to be done by the party to whom he was claimed to be indebted, before a right of action would have accrued in favor of such party. *ib.*

HARBOR.

1. The owners of land bounded on a harbor own only to high-water mark. They have a

the statute, and they received it and considered it in their determination of the case; it being sent and received without the knowledge of the respondents. Held that the receiving of it was not in the circumstances "irregular and improper conduct" on the part of the committee. *Horton v. Town of Norwalk.* 237

HUSBAND AND WIFE.

See EQUITY, 10.

INSOLVENT ESTATE.

See COMMISSIONERS ON INSOLVENT ESTATES, 1, 2.

INSURANCE (FIRE).

1. Upon an information for burning a building with intent to defraud an insurance company—it was held—1. That it was not necessary to prove the legal existence of the company. That if the company had a *de facto* organization, and was actually doing business, and the accused believed the policy to have been legally issued, and burned the building with the expectation that the money would be paid and for the purpose of obtaining it, it was sufficient. 2. That if it was necessary to prove the legal existence of the company, which was a foreign one, a certificate of the insurance commissioner of this state that the company had complied with the laws of the state and was authorized to carry on business here, (the statute requiring the commissioner to issue such certificate only on proof of the facts and on a deposit with him of a copy of the charter and a sworn statement of its officers,) and the testimony of the agent of the company here that he had issued numerous policies for the company, were *prima facie* evidence of such legal existence; the case not being one in which the company was asserting its rights or in which its legal existence was directly in issue. 3. That the fact that the policy was made payable to a mortgagee of the building was not inconsistent with the allegation that the company insured the building to the accused. 4. That the intent to defraud the insurance company could be inferred from the circumstances. *State v. Byrne.* 273

2. The plaintiffs, who were trustees under a second mortgage of a railroad company, were in possession of and operating the road in 1874, and at that time procured of the defendants, a fire insurance company, a policy of insurance on a freight depot belonging to the road, the policy describing the insured as "trustees of the convertible mortgage" of the railroad company, and the property as "their frame freight depot building occupied by them," and containing a provision that "if any change shall take place in the title or possession of the property, whether by legal

process, judicial decree, or voluntary transfer, this policy shall become void," and a further provision in another section, that "if the property is disposed of, so that all interest on the part of the assured has ceased, this insurance shall immediately terminate." In May, 1875, the state treasurer, as trustee under a prior mortgage of the road, obtained a decree of foreclosure against the plaintiffs as trustees under the second mortgage, and against the railroad company, which decree, by a failure to redeem, became absolute in June, 1875. The state treasurer took possession of the road and appointed the plaintiffs his agents to operate the road. They continued to do so, one of them acting as superintendent, as he had done while trustee. The state treasurer soon after conveyed the entire property to a new corporation, constituted of the holders of the first mortgage bonds, and the new company appointed another superintendent, who took charge of the road early in August, 1875. On the 18th of August, and within the term of the policy, the building insured was burned. The building was at this time and had from the first been in the possession and charge of one B as a freight agent. The plaintiffs, while acting as trustees, had advanced and become personally liable for over \$83,000 for the benefit of the road, a large part of which claim was in existence when the insurance was effected and remained unpaid at the time of the fire. For this they claimed a first lien upon all the property of the road, and the court, in the decree of foreclosure against them, provided for this claim as such a lien, to be discharged from the first earnings of the road. In a suit on the policy it was held—1. That the foreclosure of the first mortgage and the conveyance of the railroad property by the state treasurer to the new company, constituted such a transfer of the property insured as terminated the insurance under the terms of the policy. 2. That the interest which the plaintiffs had in the property, by virtue of the lien given by the decree for their advancements and liabilities, was a different interest from that which they had held as trustees and which had been insured, and was not sufficient to save the policy from the effect of the transfer. 3. That parol evidence was not admissible to show that the insurance, under the description in the policy of the property insured, was really intended to apply to the interest which the plaintiffs had in the property by reason of their advancements and liabilities. *Bishop v. Clay Insurance Co.* 430

INSURANCE (LIFE).

1. By statute the insurance commissioner, on finding that the assets of any life insurance company of this state are less than three-fourths of its liabilities, is to apply to the

Superior Court for the appointment of a receiver and the annulling of its charter. Held to be no answer to a petition for this purpose that the respondents had, by legislative permission, transferred all their assets to another company, which had assumed all their liabilities, so long as the holders of their policies had not assented to the arrangement. *Stedman v. Am. Mut. Life Ins. Co.* 377

2. A life insurance company refused to receive the premium on one of its policies from a holder on the ground that it had become forfeited by a breach of one of its conditions by the person whose life was insured. The holder, without rescinding the contract, brought an action against the company on an implied promise to receive the premiums and keep the policy in force. Held that the law did not imply such a promise and that the action could not be maintained. *Day v. Conn. General Life Ins. Co.* 480

3. There were three courses open to the holder of the policy in the circumstances. 1. He might elect to consider the policy at an end, in which case he could in a proper action recover its just value. 2. He might institute an equitable proceeding to have the policy adjudged in force, in which case the question of forfeiture could be determined. 3. He might tender the premium and wait till the policy became payable by its terms, and then try the question of forfeiture in a proper action on the policy. *ib.*

JUDGMENT.

See **BANKRUPTCY, 1; EXECUTION (LEVY OF), 1.**

JURISDICTION.

1. By the charter of the city of New Haven the jurisdiction of the City Court is made to depend upon the fact that one of the parties "resides" in the city. Held that by the term "resides" is meant that continuous and voluntary abiding which constitutes lawful residence, as distinguished from that which is temporary. *Charter Oak Bank v. Reed.* 391

2. Held therefore that, where a person boarded in the city during the winter months, but lived in another town during the summer, being an inhabitant and voter in the latter place, and intending to remain only temporarily in the city, he did not reside in the city within the meaning of the charter. *ib.*

3. A suit was brought to the City Court against *R*, the writ describing him as residing in the city, and was continued for four terms, when it was assigned for trial on the general issue. Before the trial, however, *R*'s counsel, having then for the first time ascertained the fact that he did not reside in the city, with the leave of the court filed a plea to the jurisdiction on that ground, which plea the court sustained, and dismissed the case for want of jurisdiction. Held to be no error. *ib.*

See **PLEADING, 1, 2,**

LAW AND FACT (QUESTIONS OF).

1. In replevin by the owner of cattle held by the defendant as pound-keeper the court below found in detail certain facts with regard to the establishment of the pound and the detention by the defendant of the cattle therein, and concluded the finding as follows: "The court finds that said cattle were unlawfully detained by the defendant and that the plaintiff was entitled to the immediate possession of the same." Held to be a conclusion of law from the facts stated, which could be reviewed by this court on a motion in error. *Bosworth v. Troubridge.* 161

2. Questions of ownership of personal property are generally mere questions of fact. *Pratt v. Pond.* 386

3. But held that, in the present case, where a wife claimed to be the owner, and her title depended upon the validity, as against the creditors of the husband, of transactions between her husband and herself, the question was so much one of law that the court could review the conclusion of the court below upon a special finding of the facts. *ib.*

See **RAILROAD (HORSE), 1.**

LEASE.

1. It is a well settled principle of the common law that the grant of the reversion of an estate expectant on the determination of a lease for years, passes to the grantee the rents reserved in the lease as incident to the reversion. *King v. Housatonic Railroad Co.* 226

2. Since the statute of Anne, notice of the grant to the tenant has been sufficient in the English courts to entitle the grantee to demand and recover the rents. *ib.*

3. And that rule has been adopted by the courts of this state, and by those of many of our sister states. *ib.*

4. Where the grant of the reversion is by way of mortgage, the mortgagee, though entitled to the rents as incident to the reversion, may take them or not at his election. If he allows the mortgagor to receive them, and afterwards elects to take them himself, and gives notice of his election to the tenant, he becomes entitled to all the rents accruing after the execution of the mortgage and in arrear and unpaid at the time of the notice, as well as to those which accrue afterwards. But the rents in arrear at the time the mortgage was executed belong to the mortgagor. *ib.*

5. A railroad company leased its road to another company for five years, and afterwards mortgaged the same property to trustees for the holders of certain bonds, the mortgage providing that the mortgagees, on default of the payment of the semi-annual interest on the bonds for six months, might enter and take possession of the property and receive the rents and income. The mortgagees entered for default of payment of interest, and gave notice to the lessees to pay to them all

rents then due or thereafter accruing. At this time a large sum was due from the lessees for rent, and a few days after the entry a creditor of the lessors factorized the lessees as debtors of the lessors for the rents overdue. Held that these rents were not taken by the attachment, but belonged to the mortgagees. *ib.*

LEGISLATION.

See STATUTE.

LEVY OF EXECUTION.

See EXECUTION (LEVY OF).

LICENSE.

See EQUITY, 5.

LIEN (BUILDERS').

See BUILDERS' LIEN

MANDAMUS.

The writ of mandamus is designed to enforce a plain positive duty, upon the relation of one who has a clear right to have it performed, and where there is no other adequate legal remedy. *State v. N. Haven & Northampton Co.* 332

MARRIED WOMAN.

See PLEADING, 4.

MASTER AND SERVANT.

The defendants, who were paper manufacturers, sent their servant with a team belonging to them to deliver a load of paper to one T, four miles distant, directing him to return thence to the mill by a particular route, getting a load of wood on his way. When he arrived T requested him to go on with the paper to a warehouse at H, four miles farther, and to get some freight at the railway station in H, pay the freight bill and bring the freight to him. The servant drove to H, and while at the railway station there left his horses unhitched and unattended, and they ran away and injured the property of the plaintiff. Held that the servant was not to be regarded as at the time in the employment of the defendants, and that they were not liable. *Stone v. Hills.* 44

MECHANICS' LIEN.

See BUILDERS' LIEN.

MISTAKE OF FACT.

See MONEY PAID UNDER MISTAKE.

MONEY PAID UNDER MISTAKE OF FACT.

The plaintiffs entered into a contract with the defendant, under which they were to have the exclusive right to manufacture and sell vari-

ous articles under numerous patents owned by him, the right to continue during the life of the patents and any extension of them, and they to pay him a royalty on all the articles sold, the defendant agreeing to defend them against all parties claiming a right to use the patents. Certain of the patents expired and were not renewed by the defendant, but the plaintiffs not being aware of the fact, but believing them in force, went on paying the royalty upon articles made under them, the defendant receiving the money in the belief that he was entitled to it under the contract. In a suit to recover back the money so paid, it was held—1. That under the contract the defendant was not entitled to a continuance of the royalty until all the patents had expired, but only to receive it on the articles manufactured under the patents that had not expired. 2. That if the money was paid in ignorance of the fact that the patents had expired, the plaintiffs were entitled to a repayment of it. 3. That the fact that the plaintiffs had the means of informing themselves by enquiry of the defendant, was not sufficient to charge them with knowledge; it being a case where they might reasonably expect the defendant to inform them. 4. That the payment after they had knowledge, of the royalty on articles manufactured under the unexpired patents, did not constitute a waiver of their right to demand back the money paid as royalty on articles manufactured under the patents that had expired. *Stanley Rule & Level Co. v. Bailey.* 464

MORTGAGE.

1. A mortgage may be foreclosed for interest overdue on the mortgage note, where the principal of the note is not yet due. *Buller v. Blackman.* 159
 2. The charter of the city of New Haven provides that the common council, in taking land for a street, under the power given it to lay out streets, shall give notice, and afterwards make compensation, to the "owner" of land so taken. Held that, where land so taken is covered by a mortgage, the mortgagor and not the mortgagee is the owner of the land within the meaning of the charter, and that after notice has been regularly given and compensation made to the mortgagor, the city is not liable to the mortgagee. *Whiting v. City of New Haven.* 303
- See EQUITY, 2, 3, 6, 7, 8.

MUNICIPAL LIABILITY.

1. The charter of a borough gave the warden and burgesses authority to order the removal of all encroachments upon any public highway of the borough, and upon the order not being obeyed to cause them to be removed. The warden, acting officially and under a vote passed by the warden and burgesses,

caused a fence of the plaintiff along the line of the highway to be removed, the plaintiff not obeying an order previously made for its removal. The fence was in good faith supposed by the warden and burgesses to be an encroachment, but was not so in fact. In an action of trespass brought against the borough, it was held—1. That the grant of power, though to the warden and burgesses, was in reality to the borough. 2. That the power to remove encroachments was a power asked for and obtained by the borough for its own advantage and not for the benefit of the public. 3. That in the removal of encroachments it was therefore exercising a privilege, not discharging a governmental duty. 4. That the borough was liable for the acts of the warden. *Weed v. Borough of Greenwich*. 170

2. Where a town does an act lawful in itself in such a manner as to create a nuisance, it is liable in the same manner that an individual would be. *Moody v. Town of Danbury*. 550
3. The authorities of a town built a bridge in such a manner as to set back the water of the stream upon the plaintiffs' land. Held that the town was liable to the plaintiffs for the damage done. *ib.*

NEW TRIAL.

1. A "new trial" granted upon motion for error upon a former trial, means a new trial of the issue of fact before tried. *Zaleski v. Clark*. 397
2. Where an issue of fact was tried by the court, and a special finding of facts made, and upon the facts so found the court as a conclusion of law rendered judgment for one of the parties, and the other party moved for a new trial for error in the conclusion of the court, and a new trial was granted without qualification, it was held that there should be a new trial of the facts before found. *ib.*
3. But the court had power, in granting the new trial, to limit it to the conclusion of the court as to the law upon the facts, without disturbing the finding of facts. *ib.*
4. The power to grant new trials is not dependent upon statute, but is incidental to courts of common law. *ib.*
5. A motion for a new trial is the only mode of bring up for review in the Supreme Court any errors in the charge of the court, or in rulings as to evidence, in the Superior Court and Court of Common Pleas. *Ward v. Donovan*. 559

NEW TRIAL (PETITION FOR).

1. Upon a petition for a new trial for newly discovered evidence, after a conviction for a rape, it was held—1. That the fact of the existence of the newly discovered evidence could not be proved by mere *ex parte* affidavits. 2.

That new evidence was not sufficient that merely went to show that the principal witness had before the trial made a statement inconsistent with that made on the trial. 3. Nor that which showed that the witness, (the victim of the rape,) had altered her opinion as to the petitioner being the person who committed the crime, where the change of opinion originated in a suggestion by another and was arrived at by a process of reasoning. *Shields v. The State*. 266

2. It is a general rule that a new trial will not be granted upon the mere after-recollection of a former witness. *ib.*

NOTES AND BILLS.

1. The defendant, a holder of a negotiable note payable in five years from date with interest, endorsed by the payee in blank, delivered it before maturity to the plaintiff, with his name endorsed on it under that of the payee, but with the following words in his own writing above his name:—"Rec'd one year's interest on the within. May 10, 1871." Held that the whole entry taken together imported merely the acknowledgment of the payment of interest on the note, and that if the plaintiff would show that the defendant had made himself an endorser of the note by his signature, he must show by evidence *abundant* that the signature had no connection with the words written above it. *Clark v. Whiting*. 149
2. While a negotiable note payable on demand is by statute dishonored at the end of four months if not paid, yet where such a note is on annual or semi-annual interest, it will be presumed, in the absence of evidence to the contrary, that the endorser made his endorsement with no expectation that demand of payment would be made at the end of four months, and therefore with a waiver of such demand. *Hayes v. Werner*. 246
3. The taking of security by the endorser at the time of the endorsement is not in itself a waiver of demand and notice, but it is evidence of it, and goes to fortify the presumption arising on the face of the note. *ib.*
4. Where such an endorser afterwards promised to pay the note, not knowing at the time that demand had not been made, but with no reason to suppose that it had and in a state of indifference on the subject, it was held that, if not in itself a waiver of such demand, it was strong evidence of an intention at the time of the endorsement to waive demand, and went strongly to fortify the presumption arising on the face of the note. *ib.*

NOVATION.

1. A novation does not create a new indebtedness, but simply applies an existing indebtedness in payment of a debt of the creditor; and it is a necessary incident of the transac-

tion that the original indebtedness to the intermediate creditor, and his indebtedness to his own creditor, should be discharged. *Allen v. Rundle.* 528

2. *B*, who was indebted to a corporation by a subscription to its stock, gave a note to the plaintiffs for a debt owed them by the corporation, but there was no agreement that the amount should be applied on his indebtedness to the corporation. The financial manager of the corporation, however, of his own accord and without *B*'s knowledge, entered the amount of the note to his credit on his account for the stock. Held not to bring the case within the law of novation. *ib.*

OFFICE.

See PUBLIC OFFICE.

OFFICER'S RECEIPT.

See BANKRUPTCY, 1; RECEIPTOR, 1, 2.

PARTNERSHIP.

1. A debt of a copartnership is also the joint and several debt of the individual partners. *Strang v. Niles.* 52
2. A firm was dissolved and a part of its members as a new firm went on with the business. The plaintiff, who had been a book-keeper of the old firm, kept on with the new, and carried a balance due him for services from the old firm into his account with the new; and his account thus made up was afterwards paid by the new firm, they not knowing that it embraced any part of the old account. Held that, as the members of the new firm were personally liable for the debts of the old, the plaintiff was entitled to retain the money so received. *ib.*
3. Several persons who were tenants in common of certain quarry lands formed a copartnership in 1850 to carry on the quarrying business, the several partners putting in their interests in the quarry lands, and having a corresponding interest in the copartnership. One of the interests thus put in was owned by *M* a widow, for life, and subject to her life estate, by *P* her daughter, and the interest in the copartnership was owned by them in the same manner. By the partnership agreement the copartnership was to continue so long as a majority in interest should desire. The business was continued, by assent of all parties, through several changes by death and succession, until 1872, when *M* died, giving by will all her interest, which was mainly her share of the undivided profits, to her grandchildren, who with her administrator were the petitioners. These profits had been very large, but instead of being divided had been invested in other quarry lands, which had been in part worked. After 1872 the business was still carried on as before, under the management of *B*, who had been the principal

manager from the first. In 1874 the petitioners, having previously demanded of *B* an account and payment of the moneys due them from the copartnership, brought a bill in equity praying that all the property bought with the profits of the business previous to the death of *M* might be sold, and their share of the money paid over to them, that an account be taken of all the copartnership dealings, and that a receiver be appointed. The petition averred that the petitioners, by reason of the deaths of members of the copartnership and the confusion of interests, were unable to say whether the copartnership was dissolved, but that they believed and therefore averred that it was dissolved. *B*, as manager of the business, had incurred large personal obligations, and a large amount of property taken by him for debts due the copartnership had greatly depreciated. Held—1. That the copartnership was to be regarded as continuing by consent of the parties succeeding to the interests of members who had died, and as still existing. 2. That the allegation that the petitioners were unable to say whether there had been a dissolution or not, but that they believed and therefore averred that the copartnership was dissolved, was not an averment that the copartnership had been dissolved by a withdrawal of the assent under which it had been continued and a demand for a dissolution. 3. That the demand by the petitioners of an account from *B*, and of payment of their share of the profits, did not constitute a demand for a dissolution. 4. That the petitioners were not entitled to demand in cash the value of their interest, inasmuch as they had consented to let the business go on under the management of *B*, and having taken their chance for profits from the use of their share by the copartnership they were to share the risks of loss from the continuance of the business. 5. That the petitioners could effect a dissolution of the copartnership by giving distinct notice to *B* that they should not longer consent to its continuance, and should hold him accountable as a surviving partner for the further use of their share of the copartnership property. *Duffield v. Brainerd.* 424

PAUPER.

1. The statute (Gen. Statutes, tit. 15, ch. 2, part 1, sec. 5.) provides that "when a person not an inhabitant shall become poor and unable to support himself, the selectmen of the town shall furnish him with necessary support as soon as his condition shall come to their knowledge." Held not necessary that the selectmen should act as a body, or upon consultation, in such a case, but that any one of them was empowered to furnish the relief needed. *Weldon v. Town of Wolcott.* 329
2. And held therefore that a town was liable for necessities furnished to such a person upon the request of one of the selectmen. *ib.*

PAYMENT UNDER MISTAKE.

See MONEY PAID UNDER MISTAKE.

PLEADING.

1. Where a declaration in assumpsit set up in different counts separate demands, each of which was below the jurisdiction of the court, it was held that the court had no jurisdiction, although the different demands in the aggregate were of sufficient amount, and although the damages claimed were within the jurisdiction. *Camp v. Stevens.* 92
 2. After judgment had been rendered for the plaintiff in the case, the defendant at the same term of the court moved that the case be stricken from the docket for want of jurisdiction. Held that the motion was not too late, and that the case might properly be stricken from the docket. *ib.*
 3. Where certain facts are found in a case, for the proof of which no foundation has been laid by any allegations in the declaration or pleadings, they ought to be laid out of the case in rendering judgment. *Sanford v. Thorp.* 241
 4. The act (Gen. Statutes, tit. 19, ch. 5, sec. 11,) provides that "when a married woman shall carry on any business and any right of action shall accrue to her therefrom, she may sue upon the same as if she were unmarried." Held that a declaration in trespass for goods taken which described the plaintiff as "a married woman carrying on business," but did not allege that the goods were used by her in her business or that the cause of action resulted from her business, was insufficient. *Smith v. Bank of New England.* 416
 5. And held that the defect was not cured by a verdict for the plaintiff. *ib.*
 6. A defendant on whom service has been made in an action founded on contract, can by himself plead in abatement the want of service upon a co-defendant. *Draper v. Moriarty.* 476
 7. A plea in abatement is not defective in form because it prays judgment of the declaration as well as the writ. *ib.*
 8. The rule that pleas in abatement must be framed with the greatest certainty of averment, does not require courts in their construction of them to deny to the language used its ordinary import. *ib.*
 9. Where a declaration in an action on the case against a town for so constructing a bridge as to set the water back upon the plaintiffs' land, contained no averment that there was negligence or unskillfulness in the construction of the bridge, it was held to be a matter of form, the want of which could not be taken advantage of on general demurrer. *Mootry v. Town of Danbury.* 550
- See PRACTICE, 1; VARIANCE, 1.

POLICEMAN.

1. A policeman of a city is a public officer holding his office as a trust from the state, and not as a matter of contract between himself and the city. *Farrell v. City of Bridgeport.* 191
2. A person is not entitled to the salary of a public office unless he both obtains and exercises the office. *ib.*
3. By the charter of the city of Bridgeport the power of appointment of policemen is vested in the common council, such appointment to be made however only upon nomination by the board of police commissioners, unless the latter fail to make nominations, in which case the council can fill any vacancies by appointments *ad interim*. The commissioners nominated the full number of policemen and the council rejected two of the nominees and thereupon appointed *F* to fill *ad interim* one of the vacancies so made. The police commissioners refused to recognize his appointment as legal, but he tendered his services daily for one year to the proper officer, who refused to assign him to service. Held—1. That on the failure of the council to approve two of the nominations made, the right to make other nominations for the two places remained with the commissioners. 2. That there was therefore no vacancy to be filled by the appointment of *F* by the council. 3. That *F* therefore had no title to the office and was not entitled to the salary. *ib.*
4. The charter of the city provided for the appointment of policemen to hold office until regularly removed or suspended. *F* had held the office of policeman for three years under the charter, when the common council, under a power given by the charter to make ordinances relative to the city police, passed an ordinance that the appointments should be for one year. *F* was nominated and confirmed under the ordinance for one year, and accepted and exercised the office. Held that, if the commissioners and council had no right by a mere new appointment of *F* for the limited term, to terminate his tenure of office under his former appointment, yet as he accepted and exercised the office under the new appointment, he could not claim that his tenure of the office was a continuance of his original tenure. *ib.*

POUND.

1. The statute (Gen. Statutes, tit. 16, ch. 10, sec. 2,) provides that when the selectmen of a town shall establish a new pound, they shall appoint a pound-keeper for it, to hold office until the next annual meeting; another statute providing for the appointment of pound-keepers by towns at their annual meetings. The defendant had been appointed by the town as its pound-keeper for a certain pound.

The pound having been damaged, so that it could not be used, the selectmen made another about fifty rods distant. Held not to be a new pound within the meaning of the statute, and that the defendant became keeper of the pound under his previous appointment. *Bosworth v. Trowbridge*. 161

2. And held that it made no difference that the old pound had been repaired and was in a condition to be used. *ib.*
3. The new pound contemplated by the statute is a pound established by the selectmen in some part of the town where there was none before, and where no pound-keeper had been appointed at the last annual meeting. *ib.*

PRACTICE.

1. The defendant, a married woman living with her husband, executed a promissory note to the plaintiffs, who afterwards brought suit against her upon it; the declaration containing a special count on the note and the common counts in assumpsit. A rule of the court required all pleas to be filed at the first term and provided that all cases in which it was not done should be regarded as standing on the statute general issue without notice. No plea was filed at the first term. Upon the trial at a later term the plaintiffs filed the note as a bill of particulars under the common counts, and claimed to recover only thereon. Held—1. That the coverture of the defendant was a matter that could not be proved under the general issue without notice. 2. That the filing of the note under the common counts was not such an amendment of the declaration as allowed the defendant to amend her plea without cost. *Monson v. Beecher*. 299
 2. On the record of the magistrate being offered in evidence in a suit on a recognizance, the defendant objected generally to its admission. In this court, upon a motion by the defendant for a new trial, a particular objection was made on account of variance. Held that, as that precise objection was not made below, it could not be made here. *Town of Wallingford v. Hall*. 350
 3. A petition in equity was reserved for the advice of this court upon a demurrer of the petitioner to the respondents' answer and a demurrer of the respondents to the replication of the petitioner. Held that in these circumstances the counsel for the petitioner should go forward in the argument. *Sedman v. Am. Mut. Life Ins. Co.* 377
 4. Whether where the facts are found, and the judgment of the court is only a conclusion of law upon the facts so found, the proper mode of carrying the case up for revision by the Supreme Court is not by motion in error or writ of error.—Note, p. 405.
- See BANKRUPTCY, 1; JURISDICTION, 3; NEW TRIAL, 1, 2, 3, 4, 5; NEW TRIAL (PETITION FOR), 1; PROCESS (RETURN OF), 1, 2.

PROBATE BOND.

By statute, (Gen. Statutes, tit. 19, chap. 1, sec. 13,) no action is to be brought upon a probate bond without the consent of the probate court, given upon the written application of some party interested. Held that, where a suit was brought without such consent, the matter could be taken advantage of only by a plea in abatement. *Prindle v. Holcomb*. 111

See TRUSTEE, 1-10.

PROBATE COURT.

See EXECUTORS AND ADMINISTRATORS, 5; TRUSTEE, 2, 3, 6, 9.

PROCESS (RETURN OF).

1. Where an execution is served upon chattels and is not returned, the levy is not invalidated. *Pratt v. Pond*. 386
2. It is otherwise with mesne process, which must be returned to sustain the legality of the proceedings had under it. *ib.*

PROMISSORY NOTE.

See NOTES AND BILLS.

PUBLIC OFFICE.

See POLICEMAN, 1, 2.

RAILROAD COMPANY.

1. A general law of the state of New York authorized any railroad companies having continuous lines to unite and form a single corporation. Two railroad companies owning roads, one of which was wholly within that state and the other partly within that state and partly within the state of Connecticut, made an agreement to consolidate and took all the formal measures required to accomplish it, but a question was made as to the validity of the consolidation by reason of the roads not having at the time a completed continuous track. A resolution of the legislature of Connecticut had provided that, whenever the company owning the road lying partly within this state should be consolidated with any other company in the state of New York in pursuance of the laws of that state, the new company should have all the rights within this state that were possessed by the old. Held—1. That an act subsequently passed by the legislature of New York recognizing the consolidated corporation as in existence, validated and established the agreement under which the consolidation was made. 2. That when the legal existence of the new corporation in the state of New York became thus established, it satisfied the requirements of the Connecticut act, and the new company became possessed of all the rights in this state which had been possessed by the old company. *Mead v. New York, Housatonic & Northern Railroad Co.* 199

2. And held that the new corporation succeeded to the power possessed by the old company, both in this state and in the state of New York, to issue its bonds to an amount necessary for completing its road, and to mortgage its property and franchise for their security. *ib.*
3. And that this power included the power to issue its bonds in exchange for, and to take up, bonds previously issued by the old company and secured by a mortgage of its property. *ib.*
4. The charter of a railroad company provided that if the road in its location should intersect any highway, the company should restore it to its former state in such a manner as not to impair its usefulness; and that the railroad should be so located within the town of *H* that in its construction and use it should not interfere with a certain turnpike road so as to obstruct, impede or endanger public travel. The location of the road was to be approved by the railroad commissioners, and a special committee appointed by the Superior Court was to determine whether the company had complied with the requirements of its charter as to the turnpike road. The road was located for two miles in the town of *H* close beside the turnpike, the traveled path of which was in some places changed to make room for the road. The commissioners approved the location, and the committee reported that the company had complied with the requirements of its charter. Thirty years afterwards, when the turnpike had become a town highway, the increase of travel upon the highway, and of the number and speed of the trains on the railroad, had rendered the proximity of the railroad to the highway a much greater injury to the public than it was at first, and the Attorney for the State applied for a mandamus to compel the railroad company to change the location of its road and to restore the highway to its former usefulness. Held—1. That the case was not one of the "intersecting" of a highway by the railroad, that term applying only to the case of a railroad crossing a highway. 2. That the provisions of the charter were not intended to impose upon the railroad company the duty of removing all danger incident to the operation of the railroad. 3. That the duty imposed upon the company was not a continuing duty. 4. That the action of the railroad commissioners and of the special committee was final as to the propriety of the original location of the road and as to the compliance of the company with the requirements of its charter in respect to the turnpike road. 5. That no further legal duty was imposed upon the company by reason of the increased danger from the increase of travel on the highway and of the number and speed of the trains. 6. That it did not affect the case that the commissioners and committee had dealt

with the questions to be determined by them as questions of property rights, giving notice only to the turnpike company and property owners, and none to the public. The legislature intended by their action to protect the interests of the public, and if they were not sufficiently secured it was a matter for the legislature and not for the courts. *State v. New Haven & Northampton Co.* 331
See LEASE, 5.

RAILROAD (HORSE).

The plaintiff, a boy ten years of age, was riding free on the front platform of a horse-railroad car, with the knowledge of the conductor and driver, the latter having requested him to hand in a package at a place they were to pass. Before quite reaching the place for stopping for this purpose, the plaintiff jumped off the platform and fell under the car and was badly hurt. A printed notice was posted conspicuously in the car, forbidding passengers to stand upon, or get on or off at, the front platform, or to get on or off the car when in motion, and declaring that the company would not be responsible for any accident happening thereby. In an action against the company for the injury the court below found that it was caused by the careless driving and management of the car, that the plaintiff in getting off under the circumstances used as much care as could be expected from a person of his age, and that no contributory negligence on his part was proved. Held, on a motion of the defendants for a new trial—1. That the conclusion of the court upon the question of negligence was one of fact, which could not be reviewed by this court. 2. That it was within the scope of the authority of the conductor and driver to receive and let off the plaintiff as a passenger, and that it did not alter the case that the conductor did not require him to pay fare. 3. That, even if the driver was not authorized to deliver the package nor to employ the plaintiff to do it, yet evidence that he requested him to carry it in was admissible on the question of negligence, to show that he knew that the plaintiff was on the car and was intending to get off at the place in question. 4. That the averment that "the defendants so negligently managed the car as to run it upon and over the plaintiff" was sufficient to admit proof that the negligence consisted in not stopping the car at the proper time. 5. That even if the plaintiff was to be regarded as a trespasser in the car, that fact would not necessarily defeat his right of action. 6. That a special duty devolved upon the conductor and driver in view of the fact that the plaintiff was so young, to see that the rule forbidding him to stand on the front platform, or get off from it, was observed by him. *Brennan v. Fair Haven & Westville Railroad Co.* 284

RAPE.

1. The court charged the jury in a case of rape, that there was no rule of law that there could be no rape unless the woman manifested the utmost reluctance and made the utmost resistance; but that the jury must be satisfied that there was no consent during any part of the act, and that the degree of resistance was an essential matter for them to consider in determining whether there was an honest and real want of consent. Held, upon motion of the defendant for a new trial, to be no error. *State v. Shields.* 256
2. While to constitute rape an actual penetration of the body of the woman is necessary, yet the least penetration is sufficient. *Id.* See EVIDENCE, 7-11.

RECEIPTOR.

1. A receiptor of goods attached, who by his receipt has bound himself to return the property to the officer upon request or pay damages, is not a mere naked bailee of the goods, but has a special property in them, and can maintain replevin against a person unlawfully detaining them from him. *Peters v. Stewart.* 103
2. Where goods were attached in the state of Massachusetts, and there delivered by the officer to a receiptor, who left them in the hands of the debtor, by whom they were brought to this state and sold—it was held, 1. That the law of this state governed upon the question whether the receiptor could maintain replevin for the goods. 2. That the receiptor was clearly entitled to the immediate possession of the goods as against the debtor, and that this alone would have been enough, under the statute in force when the suit was brought, to sustain the action of replevin. 3. That the purchaser of the goods, if he bought them in good faith of the debtor, could hold them against the receiptor. 4. That the burden of proof was on the purchaser to show that he bought them in good faith. *Id.* See CONFLICT OF LAWS, 3.

RECOGNIZANCE.

See BOND IN CRIMINAL PROCEEDING.

REPEAL.

See STATUTE, 1, 2.

REPLEVIN.

1. Replevin can not be maintained against an officer for property attached by him. It should be brought against the attaching creditor. *McDonald v. Holmes.* 157
2. The plaintiff was pound-keeper and held the cattle of the defendant in the pound. While so held they were let out by some per-

son unknown, without complicity on the part of the defendant, and returned to the defendant's enclosure. The plaintiff sent notice to the defendant that the cattle had been illegally retaken to his enclosure but did not demand them or go for them. The cattle not being returned to the pound the plaintiff brought replevin for them. Held that the defendant was not in the position of a wrong-doer, and was not liable to the action until demand had been made upon him, and he had refused to give up the cattle or to allow the plaintiff to enter his enclosure and take them. *Trowbridge v. Bosworth.* 166

3. The plaintiff purchased in good faith two watches, which afterwards proved to have been stolen from D. The supposed thief being arrested and put on trial in the city of N, the watches were, upon the request of the chief of police of the city, and with the consent of D, delivered to the former, for use upon the trial and for identification, the plaintiff requiring that they be returned to him if not identified to his satisfaction. He was not satisfied with the identification claimed. They were afterwards delivered to the mayor of the city, to be held by him for identification under a provision of the city charter. The plaintiff, having demanded them of the mayor, brought replevin for them. It was found in the suit that they were the property of D. Held that the plaintiff had no such right to the watches as would enable him to maintain the suit. *Weller v. Ely.* 547
- See RECEIPTOR, 1, 2.

REPRESENTATIONS UPON SALE.

1. A statement in an advertisement of railroad bonds for sale, that "the road is in successful operation and earning net more than the interest on all its bonds"—held to be a representation, not that the road was earning that amount at the exact date of the advertisement or during the time it might appear in the newspaper, but that the road was then on a paying basis and was steadily earning net more than the interest on all its bonds. *Blake v. Watson.* 323
2. The plaintiff offered a city lot for sale at auction, stating in handbills and at the time of the sale that the depth was one hundred feet. The lot was a part of a tract pertaining to a mansion house, and the house, which was situated in part on the lot, was to go with it in the sale, and to be so changed in position as to stand wholly on the lot. The defendant bid off the lot without measuring it, and relying upon these representations. The depth was in fact but ninety-five and a half feet, and the difference materially affected its value, especially in the use of it as the site for the house. The defendant four days after the sale informed the plaintiff that he could not accept the lot on account of the deficiency in quantity. Held, in an action brought for

the price, that the defendant had a right to rescind the contract. *Stevens v. Giddings*. 507

RESIDENCE.

See JURISDICTION, 1, 2.

RETURN OF PROCESS.

See PROCESS (RETURN OF).

SALARY.

See POLICEMAN, 2.

SALE OF PERSONAL PROPERTY.

The plaintiff, being interested as a large bondholder in the early completion of a railroad, procured a quantity of timber for its bridges, specially prepared for that purpose, to have it ready when wanted. The timber was his own private property and he was under no obligation to furnish it for the road. A firm who subsequently contracted with the railroad company to complete the road and supply all the materials required, applied to him for the timber to use in the construction of the bridges, and he told them that they might have it. No terms were agreed upon and there was no express agreement that it should be used in constructing the bridges, but it was so understood on both sides. The plaintiff delivered the timber to the firm, who were transporting it to the place where it was to be used when it was attached by creditors of the railroad company. Held that the transaction amounted to a sale to the firm, and that the plaintiff could not maintain replevin for the recovery of possession of it from the parties attaching it. *Colegrove v. Snow*. 88

SCIRE FACIAS.

A scire facias upon a process of foreign attachment is a "suit at law," within the meaning of the charter of the city of Hartford, which provides for an appeal of suits at law from the City Court to the Superior Court. *White v. Washington School District*. 59

SEA SHORE.

See HARBOR.

SERVANT.

See MASTER AND SERVANT.

SET-OFF.

1. In debt on a bond given to a town in a criminal cause, the defendant can not set off a claim against the town. The debts are not "mutual debts" within the meaning of the statute. *Town of Wallingford v. Hall*. 350
2. The town in taking the bond acts as the representative of the sovereignty of the state, and is not in the ordinary sense a creditor. *ib.*

See STATUTES (CONSTRUCTION OF), 3.

SHORE.

See HARBOR.

STATUTE.

1. It is provided by sec. 1, ch. 2, tit. 3, of the General Statutes of 1875, that county commissioners shall be appointed by the General Assembly for New Haven County, their powers and duties and terms of office being fixed by later sections of the same chapter. In 1877 the legislature passed an act as follows:—"Sec. 1. So much of sec. 1, ch. 2, tit. 3, of the Gen. Statutes as provides that county commissioners shall be appointed for New Haven County is hereby repealed, and the board of county commissioners of New Haven County is hereby abolished. Sec. 2. A board of commissioners for New Haven County is hereby created, to be appointed by the General Assembly, and said board shall perform in and for New Haven County all the duties and have all the powers provided by chap. 2, tit. 3, of the General Statutes for county commissioners." Later sections made the same provisions as the former law with regard to their number and terms of office, and the act was made to take effect on its passage. Held that the instantaneous re-enactment by the second section of the same act that was repealed by the first, rendered the repeal inoperative and left the former law in force, and that the commissioners appointed under the old law and whose terms had not expired remained in office. *State ex rel. Birdsey v. Baldwin*. 134
2. The legislature has power to repeal a statute under which an incumbent of an office has been appointed to and holds the office for a term not yet expired; and the office expires with the repeal of the statute. *ib.*
3. An act was passed by the legislature in 1872, providing for the appointment of commissioners of New Haven harbor, with power to fix harbor lines and regulate the construction of wharves. By the revision of 1875 it was provided that all public laws not contained in the revision, except acts which though public in form were of a private nature, and some others, were thereby repealed. This act was not contained in the revision. By an established custom the acts of each year were published by the secretary of the state in two pamphlets, one called "Public Acts," and the other "Private Acts and Resolutions." This act was published among the private acts for the year 1872. Held that it was to be presumed that the legislature acted with reference to this usage and to the classification made by the secretary in this instance, and intended to preserve the act in question under the description of acts which though public in form were of a private nature. *State v. Sargent*. 358

STATUTES, (CONSTRUCTION OF).

1. The charter of the city of Meriden provides that all appeals from appraisals of damage

and assessments for benefits in laying out any highway or public improvement in the city, shall be taken to the Superior Court in New Haven County. A general statute, passed since the charter was granted, provides that such appeals in any city (except Bridgeport) may be taken to any judge of the Superior Court. Held that this act applies to the city of Meriden, and that an appeal taken under it in that city was valid. *Coe v. City of Meriden.* 155

2. The act (Gen. Statutes, tit. 18, chap. 11, sec. 15,) allowing appeals from probate to be taken to the "next term of the Superior Court," is not repealed by the acts of 1876, (Session Laws of 1876, p. 100, sec. 3,) and of 1877, (Session Laws of 1877, pp. 182, 202,) which allow appeals from probate to be taken to the Superior Court on the first Tuesday of every month except July and August. *Wheeler's Appeal from Probate.* 306

3. The statute (Gen. Statutes, tit. 19, ch. 8, secs. 17, 18,) provides that in all actions of trespass, other than of assault and battery and for the taking of property exempt from being taken on execution, in which judgment shall be rendered for the plaintiff, the defendant may, upon petition to the same court, be allowed to set off against such judgment any debt that he may hold against the plaintiff. Held that the object of the exception in the statute was to protect from such a set-off any suit brought to recover damages for attaching exempt property, and that it therefore applied to an action of trover brought for such a purpose as well as to one of trespass. *Williams v. Stratton.* 566

See CONTEMPT, 2; HARBOR, 5.

STOCK (TRANSFER OF).

1. The act (Gen. Statutes, tit. 17, ch. 1, sec. 9.) provides that shares of stock may be pledged by delivering a power of attorney for their transfer, with the certificate of the stock, to the pledgee; but that no such pledge, without an actual transfer of the stock, shall be effectual against any person but the pledger and his executors and administrators, until a copy of the power of attorney shall have been filed with the treasurer or secretary of such corporation. Another act, passed in 1875, (Gen. Statutes, tit. 17, ch. 1, sec. 8,) provides that corporations "shall at all times have a lien upon all the stock owned by any person therein, for all debts due to them from such person." Held—that the latter act, immediately on its going into effect, created a lien in favor of a corporation for an old indebtedness, upon stock which had previously been pledged to a third person, such pledge being merely by delivery of the certificate of the stock and a power of attorney for its transfer, with no copy of the power of attorney filed with, or other notice

to, the corporation. *First National Bank v. Hartford Life & Annuity Ins. Co.* 22

2. A further pledge of the stock was made in the same manner after the act of 1875 was passed, the certificate then delivered being one issued by the company after the passage of that act, and containing no notice of any right of lien on the part of the corporation. Held that the corporation was still entitled to its lien upon the stock as against the pledgee. *ib.*

STREET.

See HIGHWAY.

TIDE WATERS.

See HARBOR.

TOWN.

See MUNICIPAL LIABILITY, 1, 2, 3, 4.

TRANSFER OF STOCK.

See STOCK (TRANSFER OF).

TRUSTEE.

1. The defendants were co-sureties of a testamentary trustee who converted the trust money to his own use and died insolvent, both sureties being able to respond. One of the defendants was appointed trustee, and gave bond, with the other as surety, to well and truly execute the trust. The new trustee presented a claim for the trust money against the estate of the former trustee and received a small dividend thereon. Held that, as both defendants were liable as sureties for the balance of the trust money, the defendant who was trustee was to be regarded as having received the money, and that both defendants were therefore liable on the new bond for his neglect to make certain payments of interest from the trust fund, as required by the trust. *Prindle v. Holcomb.* 111

2. Where a bond is given to execute a trust according to law, it is a breach of the bond not to render the annual account required by statute, even though the probate court has made no order for such an account. *ib.*

3. And it does not alter the case that the statute makes it the duty of the courts of probate to require all trustees to render an annual account. *ib.*

4. And in all cases where an order is necessary it is one of the duties of the trustee to apply for such an order. *ib.*

5. The annual account rendered by a trustee and approved by the court does not conclude the parties. *ib.*

6. And it seems that the court of probate has no power to settle the final account of a trustee and to determine conclusively the rights of the trustee and parties interested. *ib.*

7. The trust was under a will which directed the trustee to pay over the annual interest of

the trust fund to *D.* Held that this duty was complete without an order requiring its payment. *ib.*

8. The Superior Court can entertain a suit on such a bond, and can ascertain the damages for a breach of it without a settlement of the trustee's account in the court of probate. *ib.*
9. The case of trustees is different in this respect from that of executors and administrators. The latter have to do with the settlement of estates, of which the probate courts have sole jurisdiction; while those courts have not sole jurisdiction of testamentary trusts. *ib.*
10. In a suit on a trustee's bond, it was held that there could be no recovery for moneys which the trustee was to pay between the time of bringing the suit and the time of trial, as the suit did not involve a final settlement of all matters between the parties. *ib.*

TROVER.

1. A judgment in trover, without satisfaction, does not pass the title of the property to the defendant. *Atwater v. Tupper.* 144
2. The plaintiff brought two actions of trover at the same time against *A* and *B* who had severally converted the same property, the conversion by *B* being after that by *A*. He obtained judgment against *A*, when *B* pleaded that fact in bar of the further maintenance of the action, the judgment not having been satisfied. Held to be no bar. *ib.*
3. And held that the judgment was to be for the full value of the property. *ib.*
4. The value of the property had been found upon a hearing on the general issue before the filing of the plea in bar of the further maintenance of the action. The plaintiff demurred to that plea and the court sustained the demurrer. The defendant then claimed the right to be heard upon the question of damages. Held that, as the value of the property had been already found, and was the rule of damages, the defendant was not entitled to a further hearing on the subject. *ib.*

VARIANCE.

The plaintiff, in an action against a railroad company for an injury to him as a passenger by reason of the negligence of the defendants, averred in his declaration "that while the train was in rapid motion, he, actuated by a reasonable fear of the loss of his life if he remained on the train, and in view of an apparently unavoidable collision with another train of the defendants on the same track, and impelled by ordinary prudence, jumped from the train to escape the collision and was injured by violent contact with the ground, and that immediately afterwards the trains collided with great force." Held that the plaintiff could not introduce evidence that he remained on the train and was injured by the

collision. *Shepard v. New Haven & Northampton Co.* 34

WAIVER.

A waiver is an intentional relinquishment of a known right. The existence of such an intent is a matter of fact, that should be found by the court below and not left to be inferred by this court. *First Nat. Bank v. Hartford Life & Annuity Co.* 22
See NOTES AND BILLS, 2, 3, 4; MONEY PAID UNDER MISTAKE, 1.

WHARF.

1. The libellants were the owners of an ancient pier extending several hundred feet into New Haven harbor, which had been constructed and maintained under sundry resolves of the legislature, which authorized the collection of certain wharfage upon goods discharged upon or shipped from it, and made such wharfage a lien upon the vessels. The proprietors of the undivided lands of the town had granted the land necessary for the pier, and as an inducement to the undertaking had voted that no other wharf should be established upon the east side of it within three rods. Afterwards the libellants agreed with a canal company that the latter might run an embankment and wharf from a point on the east side of their pier to the mainland, enclosing a large basin for the boats of the canal, which, with the goods transported by them, were to be exempt from wharfage for that part of the pier taken into the basin, the libellants retaining every other right before possessed. The canal was afterwards abandoned and the basin filled up, the rights of the canal company as to the basin and pier becoming vested, with the libellants' consent, in a railroad company; the libellants neither then nor afterwards relinquishing, either expressly or by non-user, any further rights of wharfage. Afterwards, another railroad company acquired from the company before mentioned the right to construct, and constructed, a pier extending into the harbor from the basin wharf, parallel with and about four hundred feet from the libellants' pier. At this pier a coasting vessel discharged and received goods, which were transported to and from the mainland over the basin wharf and that part of the libellants' pier which had adjoined the canal basin and which was now a part of the mainland. Held, in a libel of the vessel for wharfage upon the goods—1. That while that part of the pier had become a public highway for all other purposes, it was still a part of the libellants' pier as to all freight transported over it to and from vessels. 2. That the protection of the libellants by the vote of the proprietors of undivided lands, from any other wharf within three rods, did not operate to limit their rights to the case of freight discharged from or delivered to vessels

within that distance. 3. That the goods in question were therefore liable to pay wharfage. 4. That as the law gave a lien upon the vessel for the wharfage, it was a proper case for the libel of the vessel in a court of admiralty. *Contractors for Union Wharf v. Steamer J. H. Starin.* 585

2. The construction given by the Supreme Court of Connecticut in *Union Wharf Co. v. Hemingway*, 12 Conn., 293, to the resolves of the legislature of Connecticut under which the libellants claim, must be accepted as the proper construction of those resolves. *ib.*

WILL.

1. Where a testator, leaving an estate of \$14,000, with no family, made a will five days before his death and while suffering from severe disease, by which, after giving two of his brothers \$1,000 each, \$1,000 to certain other relatives and \$1,000 to a friend, he gave the residue of his estate to a church in the town where he lived; and it appeared that the will was drawn by *H*, who was a vestryman of the church and who was the only person who conversed with him on the subject, and who was also made sole executor; that three brothers and a sister of the testator lived within a few miles of him and were not notified of his being dangerously ill until shortly before his death and after the will was executed; that *H* was deeply interested in the welfare of the church and a liberal contributor to its support; that he and another vestryman were two of the witnesses to the will and a brother-in-law of *H* the third witness; and that the will described certain half nephews and a half niece of the testator as his brothers and sister; it was held that the circumstances were such as to create a suspicion of undue influence, which might be considered by the jury without any direct proof of such influence, and to require explanation on the part of the persons propounding the will. *Drake's Appeal from Probate.* 9
2. Whether the two vestrymen were competent witnesses to the will: *Quere.* *ib.*
3. A testator gave a legacy to "The American & Foreign Bible Society." It appeared that there was an incorporated society of that name for the distribution of the Bible, established and mainly supported by the Baptist denomination; and another, incorporated earlier for the same general purpose, named "The American Bible Society," which was mainly supported by the Congregational and Presbyterian denominations. The latter society was sometimes called "The American & Foreign Bible Society," but there was no evidence that it was as well known by that name as the other society, and none that the testator had ever called it or heard it called by that name. Both societies were in the habit

of soliciting contributions for their work from the neighborhood where the testator lived. The testator's denominational associations and preferences were wholly with the Congregationalists and he had no special sympathy with the Baptist denomination. Held that evidence was not admissible, upon a claim of the American Bible Society to the legacy, that while the will was being drawn the testator said to the scrivener that he wished to give the money to the Bible society sustained by the Congregationalists and Presbyterians; that he was not sure as to its corporate name, but believed it to be "The American & Foreign Bible Society." *Dunham v. Averill.* 61

4. The name used in the will being perfectly descriptive and plainly written, and there being nothing in the will to suggest any different intention from that expressed, the court would not be warranted in intermeddling, even though satisfied that the testator did in fact make a mistake. *ib.*
5. The testator gave a legacy to "The American & Foreign Missionary Society." There was no missionary society of that name, but "The American Board of Commissioners for Foreign Missions" was a long established incorporated society for the purpose of carrying the gospel to heathen lands, was supported by persons belonging to the Congregational order, and had received annual contributions from the Congregational society of which the testator was a member, and he had been a liberal contributor to its funds. No other society carrying on the same work was connected with the Congregational order in the state, and this society was frequently called, in the vicinity where the testator lived, by the name used in the will. Held that the American Board of Commissioners for Foreign Missions was entitled to the legacy. *ib.*
6. Where a name used in a devise or legacy as that of a corporation does not designate with precision any corporation, but circumstances concur to indicate that a particular one was intended, and no conclusive circumstances appear to distinguish or identify any other, the one thus shown to be intended will take. *ib.*
7. The testator bequeathed to the Hartford Hospital a reversionary interest in certain sums given to sundry persons as annuities, and in another section of the will certain lands in Ohio. By a codicil made a few months later he revoked "all devises in said will beneficial to the Hartford Hospital," and made a new bequest of \$5,000. The Hartford Hospital, for the purpose of showing that the bequest of the annuity money was not intended to be revoked, offered evidence to prove that the lawyer who drew the will, afterwards and before the codicil was drawn, informed him that by the law of Ohio a bequest or devise to a corporation made within twelve months before the death of the testator

- was void, and that another lawyer who drew the codicil, on being informed of the facts with regard to the devise of the Ohio land, asked the testator if that was all he had given the hospital, and he replied that it was. The court below found, if this evidence was admissible, that while the testator intended to revoke all provision made in his will for the Hartford Hospital, and to substitute therefor the legacy of \$5,000, yet he did not at the time have in mind the fact that he had made a bequest of the annuity money to the hospital, and his attention was directed only to the devise of the Ohio land. Held that the evidence was not admissible. *ib.*
8. Where a testator by a codicil revokes a devise or legacy, and grounds such revocation on the assumption of a fact which proves not to exist, the revocation is regarded as contingent upon the existence of such fact and does not take effect. *ib.*
9. But the courts will not set aside such a revocation where it does not appear by the will itself that it was made under the belief of the existence of such fact. *ib.*
10. The bequest to the Hartford Hospital of the reversionary interest in the annuity money, was to create a fund of which the interest should be paid out to persons discharged from the hospital, who should be destitute and worthy of aid. The revocation in the codicil was "of all devises *beneficial* to the Hartford Hospital." Held that the bequest, though for the direct benefit of persons leaving the hospital, was yet to be regarded as beneficial to the hospital. *ib.*
11. The testator gave to *A* a legacy of \$3,000. The will was made in 1874. In 1872 the testator had given *A* \$3,000, and taken from him the following receipt: "Oct. 1, 1872. Received of *J. R.* three thousand dollars in anticipation and discharge of any legacy bequeathed to me by said *R* by his will of prior date." Held that the payment of the \$3,000 did not constitute an advancement on account of the legacy given by the will of 1874, the receipt limiting its application to a will of prior date. *ib.*
12. And when the testator upon having his will re-drafted chose to renew the legacy to *A* given by such prior will, he was to be presumed to have done so in view of all the facts. *ib.*
13. A bequest to the "Home Mission Society" construed as a bequest to the "American Home Missionary Society," upon proof of facts, outside of the will, showing that that society must have been the one intended, and there being no society of the former name. *Beardsley v. American Home Missionary Society.* 327
14. A testator made the following bequest: "I give to my daughter *M*, wife of *C*, one-third of all the residue of my estate, real and personal, to hold the same to her and her heirs, to her sole and separate use, free from the interference or control of her husband; at her death to go immediately to her children, if she have any; her husband, if he survives her, not to have any use of the same, but that it be for her children." Held that the estate given was a fee and not a life estate. *Landon v. Moore.* 422
15. A testator made the following bequest:—"The residue of my estate I give to the following named persons, to be divided equally among them; my sisters *R* and *S*, the grandchildren of my deceased brother *W*, and the grandchildren of my deceased sisters *D* and *M*; meaning by this to include all the grandchildren living at the time of my decease." Held that the grandchildren took *per stirpes* and not *per capita*. *Raymond v. Hillhouse.* 467
- WITNESS.
- See EVIDENCE, 3.



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